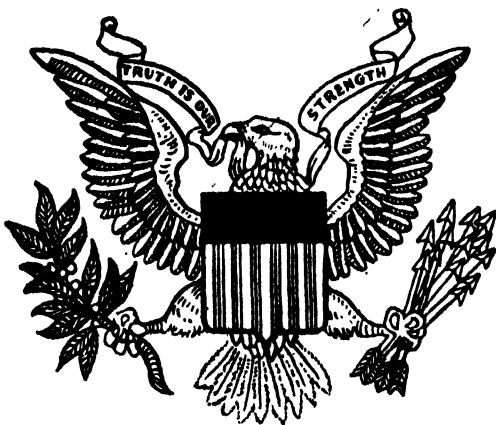


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# A CARTEL POLICY FOR THE UNITED NATIONS

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## FOREWORD

**T**HIS LITTLE BOOK contains papers by five authors about various aspects of American policy toward international cartels after the war. The papers were originally presented as lectures at Columbia University in March and April, 1945, under the auspices of the Faculty of Political Science. A sixth lecture was delivered by Myron Watkins on the subject of the relation of cartel policy to certain special types of industry, but because of other commitments to write about cartels Mr. Watkins has not been able to obtain its release for publication at this time.

The papers seek to summarize the bearing of international cartels upon economic prosperity and political security, to appraise the efforts which have been made separately by various countries to cope with the cartel problem, and to indicate the possibilities for curbing cartels which are implicit in the defeat of Germany and in the plans for joint development of post-war commercial policies by the governments of the United Nations.

The authors have been employed in various capacities by agencies of the Federal Government to study international cartels, to formulate or administer governmental policies toward cartels during the war period, and to make recommendations about post-war policy. In their work they have had access to substantial amounts of new information about cartel practices which has become available during the last few years. They have developed a general similarity of view about cartel problems.

In no case, however, do the views set forth in this volume

attempt to reflect those of any government agency. Some of the authors are no longer in government employment. The others have expressed, not official views, but their personal opinions as students of the subject. The individual character of each contribution is evident in the fact that upon some points of interpretation and of policy the various papers will be observed by the discerning reader to disagree. The authors have endeavored to express a substantial consensus as to policy, not to formulate a rigid credo for the orthodox.

In preparing the lectures for publication, Corwin D. Edwards has acted as editor.

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## THE NATURE OF THE INTERNATIONAL CARTEL PROBLEM

By FRITZ MACHLUP <sup>1</sup>

UNTIL A FEW YEARS AGO the word "cartel" was hardly known in this country. Economists used it occasionally in discussing the organization of industry in Europe. The word and its meaning became notorious in this country when, before a Senate Committee which was investigating the use of patents, charges were made that cartel agreements between American and German firms had gravely weakened the national defense. The charges were spread over the front pages of the newspapers, and the man in the street was soon talking about the "cartel menace" and the sinister activities of I. G. Farbenindustrie.

Interest in cartels has also been aroused as a part of the widespread discussions on how to attain "full employment" after the war. Few matters are of greater interest to the public than whether good times or bad times are ahead, and a relationship is said to exist between unemployment and cartels. Wide publicity was given to discoveries of cartel arrangements which had permitted American producers to obtain exorbitant prices for materials or articles produced at relatively low cost. Cartels were blamed for suppression or delay of the use of technological improvements, thereby depriving the consumer of what might

<sup>1</sup> Professor of Economics, University of Buffalo, on leave; Chief, Division of Research and Statistics, Office of Alien Property Custodian; Acting Managing Editor, *American Economic Review*; author of *The Stock Market, Credit, and Capital Formation* (New York, 1940), and of *International Trade and the National Income Multiplier* (Philadelphia, 1943).



have been a considerable advance in living standards. Cartels were made responsible for endangering the public health by overpricing important drugs and medical supplies. Sharp attacks were launched by former Vice President Henry A. Wallace, who said that "cartels are the greatest menace to the American business principles of free enterprise and equal opportunity."<sup>2</sup>

The view is by no means uncontested. There are even those to whom cartels appear as a great boon to the public. To quote from a statement of the World Trade Alliance: "If Great Britain and the United States will take the lead and get the producers of each main product to prepare schemes for world export regulations, then general employment can be insured."<sup>3</sup> Here, international cartels are pictured as public benefactors rather than as Public Enemy No. 1.

From the point of view of the economist, it is now possible to discuss cartels more intelligently than heretofore on the basis of the mass of material which has been brought to light by the investigations of the last few years. A series of Congressional committees have interested themselves in various aspects of international cartels, the Antitrust Division of the Department of Justice has secured several indictments of American firms on charges of participation in international cartel arrangements, and the enemy interests in cartel contracts have been seized by the Alien Property Custodian.

From the point of view of persons who advocate action to limit or destroy the power of international cartels, the interruption of normal trade during the war provides a unique opportunity. War has made the cartels inactive. It should be far easier

<sup>2</sup> Henry A. Wallace, address under the auspices of the Chicago United Nations Committee to Win the Peace, quoted from the *New York Times*, Sept. 12, 1943.

<sup>3</sup> World Trade Alliance (Sir Edgar Jones, Director), quoted from *The New Republic*, March 27, 1944, p. 430.

to prevent a resumption of their activities than to attack them when they are once more in full operation.

Some spokesmen for cartels take exception to the introduction of the term into the English language and to the vagueness of its definition. It is true that English-speaking people have been getting along for many years without the word, using instead of the German *Kartelle* and *Syndikate* such terms as "pools," "combinations," and "conspiracies in restraint of trade."

The term "cartel," in my opinion, is useful. "Pool" is much too narrow in meaning; "combinations" or "conspiracies in restraint of trade" have their fixed legal meaning. Not all cartels are necessarily illegal under the antitrust laws of this country. In England and in most other foreign countries they usually are not regarded as illegal restraints.

It is preferable to avoid legal terminology in describing economic phenomena. It may take a long time for courts to ascertain whether a certain arrangement is "in restraint of trade" in the legal sense; and whether or not it may properly be characterized as a "cartel" is a matter of appraising its economic purposes or effects—not a matter of judicial opinion.

Cartels may be defined simply as business arrangements which have the purpose or effect of reducing or regulating competition. The term "arrangements" is used here advisedly because it is wider than "agreements." Arrangements may be in the form of agreements or of informal understandings, memberships in associations, establishments of centralized selling agencies, and so on. Definitions have been sometimes suggested which speak of agreements "among competitors." This would again be too narrow. Many cartel arrangements are not based upon agreements among competitors but rather on a set of separate arrangements with some third person; examples are membership contracts in trade associations, cooperatives or clubs, or

mere arrangements made by the individual "competing" producers or exporters with a joint-sales agency.

Other definitions refer to agreements "among financially independent firms." This qualification was meant to distinguish cartels from combines or trusts. Again it makes the definition too narrow for most purposes. There is no reason why firms which are affiliated through ownership relations (such as common ownership, interlocking shareholding or interlocking directorates) should not also be members in a cartel arrangement. The reason for distinguishing cartels from combines is that combines can achieve concerted action of affiliated firms without any agreements. It is probably important to realize that cartels and combines may be alternative ways of achieving the same results. But, at the same time, agreements may exist among the members of a combine supplementing any organizational influences by more detailed provisions. Indeed, separate agreements among members of a combine are likely to exist whenever the managements of the various parts of the combine cannot maintain sufficiently close contacts or when firms outside the combine are also needed as partners for a workable arrangement to regulate competition.

Certain definitions of international cartels call them business agreements among firms in different countries. It is not as simple as that. Arrangements among firms within one and the same country may effect the same restrictions on international trade as may be brought about through arrangements among firms in different countries. Should export associations be excluded from the concept of "international cartels" if they restrict exports? It would be nonsensical to characterize arrangements among Swedish and Norwegian exporters as international cartels but not to apply this term to arrangements among exporters of the United States. The latter may affect international trade to a

much greater extent. Furthermore, if restrictive arrangements among the exporters within one country were not considered as international cartels even when they concerned themselves directly with the regulation of competition in export trade, it would be possible for firms in different countries to transform their international arrangements into purely "domestic" ones by the simple device of having domestic subsidiaries of foreign firms make these arrangements with domestic producers.

In the light of these considerations, then, a workable definition of international cartels would be: Business arrangements which have the purpose or effect of reducing or regulating competition in international trade.

The ultimate objective of cartel arrangements is to secure higher net returns to the producers or sellers of the cartelized industry; and this, as a rule, means higher selling prices. Some cartels are no more and no less than price-fixing arrangements; some others are arrangements concerning the terms of selling (discounts, rebates, terms of credit, and so on) affecting the net prices received by the sellers. Since competition sometimes takes the form of "bigger and better" products instead of lower and lower prices, there are cartels that regulate the quality of the products or services offered by the competing firms.

Although net selling price is the essential thing, most cartel arrangements do not concern themselves directly with price fixing. Where it is possible to divide the market, price agreements are not necessary for achieving the desired results; on the other hand, where the number of producers is large, or the urge to produce and dispose of large outputs is great, price agreements are not sufficient and must be supplemented or replaced by restrictions of production or capacity.

Division of the market may be territorial, functional, or technological. Territorial restrictions are the substance of the most

frequent type of cartel arrangement; by dividing the countries of the world, and giving each "would-not-be competitor" relatively free reign in his own sheltered territory, price agreements are rendered irrelevant: each "competitor" becomes a monopolist or almost a monopolist in his territory. "Functional" division of the market is accomplished if each cartel member is allowed to serve only a particular category of customers; this method of apportioning the market by way of reserved lists or types of customers is not frequent in international trade. Technological division of the market refers chiefly to restrictions upon the field of use of the products or processes of production of each concern. This method of separating markets is especially adapted to patent licensing contracts. It often operates only to forestall potential competition rather than to reduce competition which already exists. This sort of restriction—keeping producers from going into fields which they may not have intended to enter anyway—is defended by many as unobjectionable because it merely perpetuates an existing division, but in the long run it may serve as a very potent barrier to competition.

Restrictions of output become an indispensable concern of those cartels which cannot divide markets and could not survive as mere price cartels. The fixed prices may be tempting enough to induce cartel members or outsiders to increase production to a volume which cannot be marketed at the agreed prices. The surplus production would soon "demoralize" the market and the price agreements would break down. Production or sales quotas, in absolute figures or in percentages, must then be fixed in addition to or in the place of arrangements on selling prices. Cartels which look still further ahead may guard against dangerous expansion of productive capacity or against the introduction of novel production techniques. While restrictions concerning the introduction of technological innovations

may have been rare in practice, restrictions of productive capacity have been among the more conspicuous cartel devices.

For most of the types of cartels described above illustrations can be found in the highly informative monograph which Professor Corwin D. Edwards prepared for the Kilgore Committee.<sup>4</sup>

Cartel arrangements vary not only in content but also in form. The following principal forms of cartels may be listed in the approximate order of "increasing tightness" of organization: loose association memberships; informal understandings; straight agreements; patent license agreements; trade-mark arrangements; joint selling agencies; strict association memberships (with provisions for fines and penalties); and arrangements with government participation. In reality there will be more hybrid than pure forms, and usually two, three, or more of the enumerated forms are simultaneously employed by one cartel.

Some definitions and classifications of cartels include the combine or trust device, but the more usual practice is to consider it separately. The development of combines is often accelerated by obstacles which the law has put up against cartelization by agreement. While an agreement among firms A, B, and C to divide markets is unlawful in this country, little can be done about the same division of markets as long as A, B, and C act as divisions of one large corporation, or even as separate corporations with financial or directorial links, guided by the same policies. The attainment of effective market control through combines is possible only in the case of industries whose enterprises are large and relatively few. The reasons are clear: in an

<sup>4</sup> U.S. Senate, Committee on Military Affairs, Subcommittee on War Mobilization (Kilgore Committee), Monograph No. 1: *Economic and Political Aspects of International Cartels* by Corwin D. Edwards (Washington, 1944).

industry of many hundreds of firms it would rarely be practicable to link all or most of them through ownership relations. (A number of these firms linked through ownership would still not constitute a dangerous combine. Only where combines create a substantial degree of monopoly are they market forces analogous to cartels.)

Patent agreements have become the most notorious instruments of cartels in recent years. In the United States, antitrust laws have caused a bias against straight agreements and in favor of patent agreements. Reasons in favor of patent agreements have existed also in countries without antitrust legislation. In many countries it is not possible to sue for failure to perform if the underlying contract is considered *contra bonos mores*—and cartel agreements have been so considered in several countries. It is relatively simple, however, to sue for infringement of a patent. If the cartel agreement is in the form of a patent license, the licensee has acknowledged the validity of the patent and he becomes automatically an “infringer” when the patent license is terminated because of his failure to perform in accordance with all its provisions. For these reasons the patent license contract has proved a highly popular form of cartel arrangement.

This form is not available to industries which do not make any patentable products or do not use any important patentable processes. These industries must resort to other cartel forms. In industries with relatively few firms, informal understandings and straight agreements may work satisfactorily. Industries with a large number of producers have to resort to arrangements through trade associations. Cartels of loose association memberships, without severe sanctions for contravention and terminable by each member at will, work satisfactorily only where competition among the members is already limited by

other conditions, for instance by product differentiation through quality or location. In industries with a large number of producers and little differentiation of products, where without cartel arrangements competition would be vigorous, only associations with strict regulations (for example, penalties payable from blocked deposits) or strictly centralized selling organizations can work effectively. As a rule, government participation becomes necessary to keep such cartels together.

Governments are often quite willing to help industrialists to form cartels and to keep the cartels from falling apart once they are formed. This has been most true of Germany, but not much less so of many other nations in Europe and Latin America. The form of government assistance to cartels has ranged from "moral suasion" to coercion, with many simple or subtle devices in between.

It is sometimes believed that "commodity agreements" are the main form in which intergovernmental agreements are substituted for private agreements in international trade. This overlooks the fact that private international schemes have frequently been arranged under government sponsorship and sometimes effected by tacit government support even without any formal agreements, private or intergovernmental. In the latter type of case, governments have concertedly "implemented" the schemes by ingenious devices, including concealed discriminatory tariffs, allocations of export quotas and import quotas, and other apparently unilateral measures of commercial policy. These concerted unilateral actions of governments have been methods of setting up international cartels.

There are those who wonder why people stand for such maneuvering and how governments have been persuaded to participate in the schemes. But often the same persons are sympathetic to proposals for "government supervision to secure



cartel policies in accord with the national interest." They do not realize that proposals of this sort are often launched by industrialists who cannot keep their cartel organizations together without government assistance or "supervision."

A convenient device for international cartelization is the trade-mark agreement. If a German concern and an American concern use identical trade-marks in their domestic markets, they can divide their export markets simply through appropriate trade-mark registrations. If the German concern registers the mark in Egypt and the American concern registers it in Brazil, the two foreign markets are effectively allocated to the respective registered owners of the trade-mark.

A not infrequently used form of cartel has thus far escaped investigation and publicity: the establishment of joint sales agencies which are given wide authority concerning the determination of prices and allocation of orders. No new company has to be founded, no formal conferences held or formal agreements signed; all that is needed is for one existing selling agent or distributor to become the sole outlet for all or almost all producers. If the sales agency enjoys the confidence of its various principals, agreements among the "competitors" are unnecessary; all that is needed beyond the "exclusive agency" contract is the continued feeling of all parties that matters are handled competently and fairly by the joint agent.

Under present antitrust laws, it would be difficult to prove in these cases any "conspiracy in restraint of trade." And yet, while it lasts, the joint sales agency is one of the most monopolistic of all cartel forms.

### *The Extent of Cartelization*

Only very incomplete statistical information on international cartels is available. A study made by the Department of Justice in 1939 enumerated no less than 179 international cartels. The

study was necessarily incomplete because it included only those cartels for which the compiler had obtained some evidence through documents or published material.

According to League of Nations and other official statistics, at least 32 percent of all international trade was under some form of "marketing control" in 1937. The percentage given, if correct, would understate the actual effectiveness of cartel arrangements, because if it were not for cartels the volume of trade in the commodities in question would be larger and would, therefore, constitute a higher percentage of total international trade.

Cartelization through patent agreements has been studied only in recent years. The Office of the Alien Property Custodian, which has seized the enemy interest in agreements between enemy firms and American enterprises and has in its files the international patent contracts which were in effect at the outbreak of the war, has made a study of a sample of 333 such contracts. It found that 38 percent of the contracts contained restrictions or prohibitions of exports from the United States and 43 percent contained restrictions of the fields of use. In 44 percent of the agreements there were provisions for cross-licensing and cross-assignments of future patents. In practice such a clause perpetuates the restrictions previously mentioned. Many provisions stated specifically that the division of territory was to be continued by future patent agreements. All in all, 75 percent of the contracts studied provided for division of markets.

Whether a division of markets along national boundaries by way of patent agreements is legal or illegal under the laws of the United States may be controversial.<sup>5</sup> That a division of

<sup>5</sup> It may be objected that territories are sufficiently protected by the patents themselves even without any restrictive license agreements. An American firm licensed under a United States patent cannot export to Germany or England if it does not have any rights under the German or English patents. Hence, it

markets effectively reduces competition among the parties and increases their monopolistic position in the reserved areas is not open to doubt.

What commodities are subjects of international cartels? The following are some examples, although by no means a complete list: In foodstuffs, the best known international cartels have been those concerning sugar, coffee, tea, and meat. In raw materials and semifinished goods, we find cartels for pulp, rubber, petroleum, fertilizers, scrap-iron, pig iron, steel, copper, tin, beryllium, magnesium, aluminum, and probably many more. Among cartelized manufactured products have been paper, chemicals, pharmaceuticals, dyestuffs, plastics, explosives, surgical instruments, and electrical machinery.

### *The Economic Effects of Cartels*

The disadvantages of cartels are self-evident from the very definition: They reduce competition, and this, as rule, means higher prices, smaller consumption, smaller production, and

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may be held that the restrictions provided in the license agreements do not go further than the patent protection per se. This is true in part only. Most international patent agreements result in a concentration of large numbers of patents under a single control. Such a concentration creates more monopoly than would be conveyed by the same patents in many different hands. The monopoly position created through concentration of patent rights may thus be said to go beyond the scope of the monopoly conveyed through the individual patent grants. Moreover, the restrictions provided in the license agreement extend beyond the scope of the patent in two respects: first, a large part of the world is not under the effective protection of patent laws, and exports to these countries would remain open unless they were excluded through the license restrictions; second, the restrictions (especially the division of territories) which are agreed upon with regard to one patented product or patented process, and perhaps promised with regard to future patents of the contracting parties, are usually tacitly or explicitly applied to the complete line of products produced by the firms in question. In many instances the number of products which are not under any patent protection is a multiple of the number of patented products and, therefore, the license agreement with its plausible sounding provision is, in fact, a cartel agreement dividing the market for complete lines of products.

smaller employment. This is true for domestic as well as international cartels. Concerning the latter it may be added that they increase the barriers to international trade, and thereby help deprive the nations of the advantages of a more extensive international division of labor.

Cartels attempt to maintain higher prices than would prevail under competitive conditions. This, indeed, is their chief purpose, though often it is euphemistically presented as "prevention of cutthroat competition" or "stabilization of fair prices." No evidence is needed to demonstrate that consumption will ordinarily be lower if prices are higher. But it is not merely the interest of consumers which calls for resistance to cartel activities. Since lower consumption implies smaller production and, at least for manufactured products, smaller production implies smaller employment, the unemployed join the squeezed consumers as victims of cartels.<sup>6</sup>

Strangely enough, the employment angle of cartel activities is sometimes overlooked. In a recent discussion of the merits of export associations a so-called expert maintained that export associations are a good thing because they do not exploit the American consumer but only the consumer abroad. This view is regrettably shortsighted. It fails to take account of major economic repercussions: for example, that squeezing the foreign consumers deprives them of the means of purchasing other American goods; that an export arrangement among producers is liable to bring about some measure of "understanding" concerning their domestic sales policies, to the disadvantage of the domestic consumer; and, above all, that the maintenance of

<sup>6</sup> It is assumed here that the mobility of labor and the flexibility of wage rates are limited. In other words, the theoretical possibility that output restrictions in certain industries will be automatically followed by a downward adjustment of wage rates sufficient to secure reemployment of all displaced workers in more competitive industries is not regarded as a fair description of the real world.

higher prices for exports implies a reduced physical volume of exports and, hence, reduced employment of American workers.

Employment is reduced also outside of the industry which "regulates" its exports. Cartelization is usually connected with some protection against expansion of capacity or against the entry of newcomers into the industry. Also, where quotas fixed by cartels limit the amounts to be exported, expansion of capacity in order to produce more for export becomes clearly unattractive. All this implies a reduction of investment opportunities, which in turn may mean a reduction of national income and employment.

In addition to the "static" effects of cartels upon prices, consumption, production, and employment, their "dynamic" aspects should be mentioned. It has been argued that cartels, by protecting their members from competition, enable them to engage in expensive research and innovation.<sup>7</sup> The opposite of this possibility, namely that cartels succeed in suppressing or postponing the introduction of novel techniques, has been argued with equal eloquence and more factual evidence.<sup>8</sup>

Many advocates of cartels insist that there are good cartels and bad ones, and that one should not blame cartels in general for certain abuses in individual cases. By definition, a cartel is a restrictive arrangement, and thus a "good" cartel must be one where the restriction of output can be said to be beneficial not merely for the producers involved but, on balance, for the economy as a whole. Can restriction of output ever be socially desirable? Temporary output restriction as a part of a scheme for the prevention of cyclical price fluctuations is often recommended as a desirable cartel activity.

<sup>7</sup> Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York, 1942), pp. 88-101.

<sup>8</sup> Corwin D. Edwards, *Economic and Political Aspects of International Cartels*.

A great deal has been said in favor of the stabilizing influence of cartels. "Price stabilization" always sounds good. "Rigidity" or "inflexibility" of prices is the same thing but sounds bad. A cartel may be able to keep the price of a cartelized product stable, or rigid, over the business cycle. Advocates of cartelization offer as the criterion of a "good" cartel that the price is stabilized at a level not above the average of the fluctuating prices which would prevail in the absence of the cartel. This criterion is of no practical use because proof is impossible. If competition is regulated, nobody can prove exactly what prices would prevail in an uncontrolled market. It is probably a safe presumption that the administered stabilized price will have a bias in the upward direction.

The advocate of cartels as price stabilizers would also have to prove that it is beneficial to have certain prices protected against industrial fluctuations while other prices cannot be so protected. As long as there are cyclical fluctuations, the stabilization of some selected prices will usually shift the burden of depressions to more competitive industries and create difficulties all around. If there is a business cycle, stability of prices over the cycle can be had only at the cost of instability of production: production will be expanded during the upswing and restricted during the downswing. This means, among other things, greater instability of employment and a shifting of the burden of the depression from the stockholder to the unemployed as well as to consumers and taxpayers.

Price stability through cartels is no cure for industrial fluctuations; it merely mitigates the cycle for a selected few and aggravates it for others.

Friends of cartels like to say that restrictive arrangements can be useful in overcoming an existing maladjustment in industry and, therefore, may have effects beneficial to society. This is

theoretically possible but in all probability has never happened in reality.

The idea is that a temporary restrictive arrangement may give the overexpanded industry a breathing spell during which to achieve an "orderly adjustment" of its productive capacity. No cartel agreement has yet been brought to light which was used for such purposes and then promptly discarded after readjustment had been attained. It has sometimes happened that "rationalization" of production has been achieved through cartel arrangements by shutting down less efficient plants and transferring production to the more efficient producers. But where this was done the elimination of overcapacity was paid for by high premiums or bonuses to the owners of the withdrawn capacity; these payments in turn, were borne by consumers in the form of rigged-up prices and were felt by workers in the form of unemployment caused by the reduced consumption.

Even these cases of technical rationalization are rare. The opposite happens more often: cartel arrangements permit inefficient producers to remain in operation while the low-cost producers hold back. And not infrequently, when cartels work on the basis of quota arrangements, members try to prepare for the next renewal of the agreements (and for the next higgling over production quotas) by further increasing their already excessive capacity. Quotas are often allocated on the basis of productive capacity. The greater the stand-by capacity of a cartel member the better his chances to win a higher quota. The artificially maintained prices also encourage rather than discourage expansion. Hence, instead of the alleged readjustment of the overexpanded industry, the result of the cartel is often increased maladjustment, increased excess capacity and thus still more "justification" for the continuance of restrictions to avert ruinous price competition.

Overexpanded industries urge their governments to help them with their cartel arrangements in order to avoid "selling below cost." Politicians, lawyers, and businessmen express the belief that producers have some sort of "right" to cover their full costs. Yet a price which covers full cost of production under conditions of excess capacity would be high enough to permit replacement of that excess capacity; it would be definitely too high from the economic point of view.

Overexpanded industries would often be glad to turn the whole business of price determination over to the government; for, under the circumstances, any so-called "reasonable" price, any price which includes "a fair return to investment," would be in excess of prices attainable under competition. Government regulation of cartels in such instances would harm the consumer and would not help correct the maladjustment of the industry.

The "maladjusted industry" argument for "temporary" cartels threatens to become a modern successor to the "infant industry" argument for "temporary" protective tariffs. Not one of the many "infant industries" has apparently grown out of its infancy: the tariffs have not been removed. It must be feared that none of the "maladjusted industries" will ever overcome its maladjustment: the cartels, once they are given government blessing, will remain.

### *The Ethics of Cartels*

It would be naïve to suppose that the cartelists, organizers or members of cartels, are necessarily immoral men.<sup>9</sup> A person who commits acts against the welfare of the community is immoral only if he is aware of it and could avert the harm by acting other-

<sup>9</sup> The author admits that he was for more than ten years partner and managing director of several paperboard mills in Austria. In the late twenties, when the industry formed a cartel for both the domestic and export markets, he was a member of the council of the cartel.



wise. Almost all organizers and members of cartels are convinced that their activities are beneficial for the whole economy. They have not simply convinced themselves that something which is good for them must be good for all; they honestly believe that the removal of "ruinous" or "disturbing" competition would benefit society. A society which has introduced and maintained protective tariffs has little right to complain about the wickedness of cartelists. The ideology in support of restrictive cartel arrangements is not different from the ideology behind most other restrictions of international trade.

There is, of course, the view that business must not be granted the right to make its own tariff walls and its own international commercial treaties; that, while governments may erect barriers to international trade, private citizens must not exercise such powers. Convincing as this view is, it may have an unfortunate result: it may lead to increasing government participation in cartel agreements, making them more restrictive and more effective and probably more numerous than the privately erected barriers have ever been.

It is also said that the cartelists are wicked in that they abuse the monopolistic power which is involved in the cartel arrangements.

"Abuse" is a much abused word. Who can say at what point the "use" of the power to restrict sales becomes "abuse"? It is naïve to believe that cartels supervised, controlled, or even fully administered by government officials would be run in a very different way than private cartels without public regulation. Businessmen can easily persuade government officials of the appropriateness and reasonableness of their price policies. More important, any price determination which is based on "cost plus" reasoning results regularly in a price higher than would follow from vigorous competition. Even the most public-spirited bu-

reocrat would set prices at levels in excess of what genuine competition would allow. Why should businessmen who do this be called wicked, if well-meaning representatives of the community would not do otherwise? In a few exceptional cases of drastic overpricing by cartels, a public price-fixer might set lower prices; but on the average, public regulation would probably come out with a level above that evolved from the policies of "wicked" cartelists who abuse their monopoly power. As long as the monopolists and cartel executives themselves have full responsibility for the prices which are set, they are impressed with at least these three limiting considerations: a) they do not want to exceed a level which they can defend as a "fair" one if criticized; b) they want to avoid a level which may tempt outsiders to enter the field as competitors; c) they attempt to adjust prices to developments in demand which may make it possible to increase sales. Of these three factors only the first is operative in bureaucratic price-fixing; moreover the "fair" price set by the bureaucrat is apt to be based on the high cost of the actual low output rather than on the lower cost of a potential higher output.

Perhaps it is necessary for the campaign against cartels that cartelists be pictured as bad men. If this is true, if society will not act against monopoly unless moral and emotional issues are brought into the picture, I shall be willing to withdraw as a character witness for the cartelists.

### *Public Policy on Cartels*

Public opinion in the United States is being wooed by two groups. On the one side are those who advocate stronger anti-trust laws and aggressive antitrust prosecution. On the other side are those who plead for exemptions and a "more reasonable" approach toward business practices; who maintain that

strong measures against cartels are impractical or unnecessary; or who, paying lip-service to the ideal of free competition, propose ineffective measures in order to avoid the strong measures advocated by the "cartel busters."

Resistance against the international cartel movement is being disparaged as an unrealistic policy, as a vain gesture of old-fashioned liberalism. "You can't turn the clock back." "We can't stem the tides of the future." "We must be realistic." Phrases like these are being used to discourage the "crusade" on behalf of the competitive system. It should be noted that the same slogans were used in foreign countries to intimidate people who believed in "old-fashioned" democracy and resisted the "trend" toward "the New Order."

Realism is not a substitute for reasoning. To plead "let us be realistic" but not to offer the specific points which are to be included in one's logical reasoning is to confess mental insolvency. If the pleaders for realism mean that we cannot succeed in persuading other nations to accept our views and that an agreement with foreign governments can be reached only if we accept their point of view, then the pleaders fail to explain what we stand to gain by such an agreement. It would be advantageous to get an international agreement for the abolition of international cartels. Yet if we cannot get it, we shall have to continue our resistance against American participation in international cartels. That we should have to accept foreign points of view concerning the merits of restrictive arrangements merely so that we can find ourselves in agreement with foreign countries is not realistic but stupid.

It is often said that any policy against cartels which does not attack their "root causes" will be futile or even harmful. And there is an often-repeated theory that most cartels are born during depressions and that an antidepression policy would be

the most effective policy against cartels. The inference from this theory is that cartels may safely be left alone while the attack is concentrated on monetary or fiscal policy.

There has never been any convincing evidence, however, for the theory that cartels are "children of depression." Cartels have been born in both prosperity and depression. (And likewise cartels have died in both prosperity and depression.) Many cartels take a long time to form. The time from the conception of the cartel idea in an industry to the birth of the cartel may be a matter of several years. Even if a cartel is born during a slump, it may have been conceived during the preceding prosperity, and vice versa. Since the "gestation" period is not uniform, no "birth statistics" of cartel arrangements can be accepted as evidence for the depression-cartel theory.

To producers, monopoly positions are desirable things in good times as well as bad. Cartelization may change losses into profits and small profits into high profits. That the desire to avoid losses is stronger than the desire to increase profits may be true in particular cases; but to hold that this is universally true is to accuse businessmen of an inertia typical only of the inhabitants of the torrid zone. It seems more likely that businessmen, if they see that they can get together in a cartel, will take advantage of this possibility, rain or shine.<sup>10</sup>

<sup>10</sup> Two qualifications to this view should be made:

1. A depression so bad that all firms in an industry are in the red may be a stronger force toward cartelization than a depression in which some firms are losing while others are still making money. For in the latter case the low-cost producers may resist the cartel temptation in the hope that they may get rid of their competitors for good if the latter cannot stand the losses and so fall by the wayside.

2. The political pressure for state aid in the cartelization of industry or for the relaxation of prohibitions against cartels may grow stronger during depressions. For in the game of politics it is easier to succeed if one can point to "intolerable" losses and the urgency of avoiding them than if one can merely point to tempting profit opportunities and the attractiveness of realizing them.

All things considered, even if depression could be shown to be a better breeding time for cartels than is prosperity, it is not advisable to rely on the elimination of depression to solve the cartel problem. Apart from the possibility that it may not be possible to eliminate depressions, prosperity-bred cartels will be both numerous and powerful and there will remain the problem of how to deal with them and with the economic calamities which they are apt to cause.

Advocates of international cartels are becoming increasingly apprehensive of the public agitation against them. It is good tactics in such situations to seize upon the most innocuous of all proposals and to advertise it as an effective and sufficient measure. Following such tactics, supporters of cartels are now endorsing a program for mandatory registration of international cartel agreements. It is contended that if the full light of publicity is turned upon international cartel agreements, sinister schemes will be made impossible.

Mandatory registration and publicity would certainly do some good and little harm. Cartelists may learn new tricks from one another, but, more important, government experts also may keep themselves informed of current practices and novel devices. But to regard registration as a cure for the evils of cartels is naïve. Hardly any scheme, however restrictive, will be prevented by publicity. It does not take much skill to persuade people that a scheme for "orderly marketing" is beneficial for the nation. By avoiding secrecy and making it official, the scheme may be placed beyond suspicion. Publicity of cartel agreements will probably deprive antitrust proceedings of some of the glamor which now attaches to the detective work of the prosecution, and it may give the cartel a substantial degree of public recognition.

The advocates of cartels think that they can allay the appre-

hensions of the antitrust crusaders if they propose legalization of government-supervised cartels. And it seems that in this propaganda they meet with a good deal of success. Brave old trust busters appear to be inclined to acquiesce in the thought that government supervision will make the cartels behave.

If it looks as though a consensus of opinion can be reached on this issue it is only because of certain mental reservations on all sides. Some advocates of a competitive society recommend government-supervised cartels in the hope that this supervision will prevent restrictive policies, or better still, that industrialists, wary of government snoopers, will prefer, under such conditions, to do without cartels. Socialists recommend government regulation of cartels as an important step toward a centrally planned society. Capitalistic friends of industrial cartel arrangements recommend government-supervised cartels in the hope that this supervision will be on paper only, will appease their opponents, and will secure with governmental blessing greater dignity and strength for their cartel organizations.

All this is most unfortunate. Government-supervised cartels are a greater threat to a democratic, competitive society than uncontrolled cartels. An uncontrolled cartel is perpetually exposed to the economic thrusts of seceders, outsiders, and newcomers, and to the political thrusts of a suspicious public and a critical government. Government control, on the other hand, is apt to protect the cartel against attacks. Government control is apt to make the cartel more bureaucratic in its operations and more autocratic in its relations with minority groups and customers. Government control sanctifies the cartel. Conspiracy becomes "regulation," unlawful restraint becomes government-approved "order," restriction becomes "planning." If a choice must be made between government-supervised cartels and "free" cartels, the latter are to be preferred for the precarious-

ness of their structure and for the economic and political insecurity of their existence. But there are, in fact, three possibilities: government-controlled cartels, uncontrolled cartels, and no cartels at all. I submit we choose no cartels!

## THE STATUS OF CARTELS IN POST-WAR EUROPE

By BEN W. LEWIS <sup>1</sup>

**I**T PROBABLY goes without saying that a complete discussion of American policy toward international cartels requires that some special attention be given to the "international" as well as to the "cartel" aspect of the problem. Programs of American action that involve acceptance of or participation in international cartels or in conventions against them, or that call for unilateral attacks, direct or indirect, or that envisage any combinations or shades or degrees of any such actions, must certainly be conditioned by, and will in turn just as surely affect the status of cartels in post-war Europe—their principal breeding ground. This paper will discuss, against a background of European attitude and practice, the kind of reception which we may expect to be accorded by Europe to various American proposals, and what results may be expected to ensue, in the European theater, from putting any of them into actual operation. What is involved in "dovetailing" our policy toward international cartels with that of Europe? What will be the effects upon them and upon us of an American policy or set of policies that flies directly in the face of European tradition? What are the chances of agreement with Europe? Must our course of action be determined, willy-nilly, by the predilections and desires of European

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businessmen? What can we do, and what ought we to do, with German cartels and combines and their trappings, and in the matter of German participation in international cartels? No final answers to these and related questions can be given here, but it should be worth while to consider alternatives, and possibly to indulge in some fairly positive suggestions.

First, just to clear the atmosphere—or to becloud it identifiably—let me confess to my personal prejudices respecting cartels. I do not like them in times of war or in times of peace. They conduce to restriction, interruption and maldirection of production in a world that needs more, and more regular, production, better directed. Their operations run frequently at cross purposes with, and render much more difficult the execution of, governmental policies democratically determined, and this in political (even “military”) as well as in economic areas. Cartels lend themselves as dependably useful governmental instruments only to aggressive, dictatorial governments. It is not possible to recognize and to encourage cartels and then effectively to control them by processes open to democratic governments.

Irrespective of their situs or the area of their operations, cartels are neither more nor less “natural” than any other form of market organization or control. This conclusion applies to continental Europe and Great Britain fully as much as the United States of America, where our wide markets and developing economy have, at least until the NRA, dictated policies of competitive expansion rather than those of cartelized contraction. Particular combinations of economic, social, and political conditions and circumstances have given rise to and have strengthened the development of cartels at particular times, most particularly depressions, nationalistic trade policies, and governmental preparation for defense and for military and economic aggression. These conditions are constantly shifting, and cartels

are no more stable, either in fact or in philosophy, than the shifting forces which breed them. As a corollary the elimination of cartels would be one step, but one step only, toward world security and prosperity; other steps, inextricably bound up with the elimination of cartels in a mutual cause-and-effect relationship, are the establishment and maintenance of world military security, the breaking down of governmental barriers to trade, and the provision of monetary and other devices to facilitate and promote trade and the productive employment of resources.

Cartels are not peculiarly indigenous to any particular peoples or areas; it is a mistake to refer to a cartel status if it is meant thereby to suggest that the cartel occupies anywhere a fixed, historically determined, unchanging and unchangeable position. Traditionally, and for quite understandable reasons, cartels have flourished more in certain areas than in others, but it is fully possible, in any area, to root them out sufficiently to retard substantially if not to destroy their blighting effect. And we can start at any time. Right now we are spelling out the kind of economic world in which we want to live and do business. So far as cartels are concerned we certainly do not start with a clean slate, and we cannot wipe it clean. It is quite possible, however, for us to write legibly above the smear. These predilections govern what I should like to see done, and what I believe it is possible to do.

In dealing with the special problem before us, the status of cartels in Great Britain and the status of cartels in Germany are focal. It is with Great Britain, more than with any other single nation, that we shall want, if possible, to develop a common positive policy; and if we can win Great Britain to our side, and with her aid and with at least the acquiescence of Russia, can work out a desirable cartel, combine, and patent program within Germany, we shall have come well to grips with our cartel prob-

lem and be well on the way to applying some effective holds. This is not to say that we shall be on the way toward a permanent solution: the cartel problem will be with us always. We shall not see the time when it will be safe for us to loosen our grip and turn our backs. If we fail with Great Britain, and if, for whatever reasons, we cannot carry through in our post-war dealings with Germany, we shall have to come at the problem with a new plan of attack, and with no holds barred. What are the prospects?

What, really, is the attitude of the British toward cartels, and particularly toward an agreed-upon anticartel program; and what is it likely to be? Does Great Britain favor cartels or competition? History gives us no clear answer and no clear answer is possible save in terms of alternative sets of assumed conditions. If the United States can be characterized at all realistically as a land of ineffective competition, it is fully as correct to refer to Great Britain as a land of ineffective cartelization. The law toward cartels in Great Britain has traditionally been more tolerant than in the United States, but in light of the total situation in which British law has been called upon to act, it is by no means clear that the people of Great Britain have in fact taken a position with reference to the proper organization of production and marketing that differs substantially from our own. Broadly, we have given cartels every encouragement by excluding foreign competition and have undertaken by other laws to destroy them; Great Britain has accorded them legal sanctuary, but, until 1932, exposed them mercilessly to the destructive winds of foreign competition. In each country, within its particular framework, and with the situation confused by such forces as patent laws, government programs, the course and conduct of marketing and advertising, and shifting economic conditions generally, together with a host of other factors, there has come to be an actual state of affairs, business-wise, which differs from

that in the other country much more on other grounds than on the basis of fundamentally different approaches to the problem of cartels and competition. In both countries there is a readily discernible disposition on the part of businessmen to protect their domains from economic dangers and threats—a disposition which leads them into agreements designed to conserve for each his traditional share of the market in which he is interested. If the market as a whole is dwindling, the disposition is strong indeed—witness both the British cartel and the American NRA developments in the thirties; although, paradoxically, if the market situation becomes bad enough, the agreements will be breached. Individuals will break loose and will seek by price reductions to maintain their traditional volumes of business at the expense of the shares remaining for their competitors (their erstwhile collaborators). The British position (or positions) on cartels should present no mystery to American observers or American negotiators. Cartel-wise, we talk the same language, respond to the same stimuli, and, with allowances for divergent economic situations and mechanisms, achieve over-all results more remarkable for their similarities than for their differences.

I wrote eight years ago that

Britain's attitude toward restraint of trade has for decades been conspicuously different from our own. The British people are completely unaware of a "trust" problem. England has no antitrust law, and agreements between producers to control prices and output and to divide markets are believed enforceable in the English courts under the ordinary laws of contract. [A recent] case in Great Britain sustains the legality of a demand by a trade association on a trader (whether or not a member of the association) for a money payment as the price of abstaining from putting him on the association "stop list" for violating recognized conventions as to maintaining association-fixed prices. But, while British producers have played with the idea of "associations" for many decades, the privilege of

controlling prices, output, and markets has really had little meaning for them in terms of actual results. England's century-old policy of free foreign trade and her exposed geographical [and economic] position have served to establish low-standard continental competition as a continuing and effective reminder to British producers of the futility of seeking to achieve profits by restricting output and raising prices.<sup>2</sup>

The opinion that cartels are not indigenous institutions and that in their coming and going they have tended to reflect shifting economic and political situations and opportunities is bolstered very substantially by the sequel which the decade of the thirties provides to the story of the sad fate suffered by British cartels in the long decades prior to the thirties. In 1937 I wrote of Britain:

But the [legal] privilege [of restraining trade] has been smoldering, and with the appearance in 1932 of a new trade policy on the part of the government, "restraint of trade" has been transformed from a hope to an actuality. The essential condition making it possible for private industry to inaugurate effective schemes of control has been provided by the Import Duties Act of 1932 and the activities of the Import Duties Advisory Committee under the terms of that act. Britain now has a substantial tariff, and behind its protective walls industrialists are having the time of their lives tinkering with their economic system, giving vent to fixations and repressions penned up for generations, and surprising themselves with their ingenuity.

The tariff provides the essential condition, the long-continued depression and the government's defense program have furnished the immediate motives. By the end of the depressed 'twenties British industrialists were tired of stealing each other's businesses by ruining their own, and, like industrialists everywhere, they saw price-cutting and other incidents of the depression only as competitive excesses which could and should be curbed by simple rules and restraints. The British government, feeling keenly the plight of unemployed

<sup>2</sup> Ben W. Lewis, *Price and Production Control in British Industry* (University of Chicago Press, Chicago, 1937), p. 3. Reprinted by permission of the publishers.

capital and labor, aware of the growth of nationalism throughout the world, and face to face with the fact that preparedness for modern warfare means continuous and complete mobilization of industry even during times of peace, has found it essential to its program that British industries be organized as units and that each be represented by an association empowered to speak for and to commit each and all of its members.<sup>3</sup>

I noted that public opinion, almost unanimously, was approving, indifferent, or acquiescent.

But the signs of reaction were even then becoming apparent, as we are now in position to realize. The Import Duties Advisory Committee, which had shunned governmental responsibility for the activities of the fine brood of cartels which it had been hatching, was ready by 1937 to report that both industry and the public were prepared to accept a "general oversight of the policy of the [cartelized iron and steel] industry by an independent body looking to the public interest in its widest sense."<sup>4</sup> There was still no indication as to how, or with what probable degree of effectiveness, such an independent body might be expected to operate, but it is significant that even while cartelization was just getting under way, misgivings were arising in sufficient degree to prompt authoritative suggestions for curbing the movement. But of even greater weight for the point is the actual response of many British industrialists to the cartelization trend. There were few outspoken recalcitrants during the middle thirties, although even then there were ominous sounds of protests, penalties were being applied against outsiders, a few rebellious members were being "told off," and "compulsion" was not an unfamiliar word in discussions of cartel projects. These years were relatively prosperous, when everyone could live com-

<sup>3</sup> *Ibid.*, pp. 3-4.

<sup>4</sup> Import Duties Advisory Committee, *The Present Position and Future Development of the Iron and Steel Industry* (London, 1937).

fortably under the cartel "big top," and when the memories of the jungle competition that prevailed during the years since the close of the First World War were still present and impressive. But when economic prospects once more turned gloomy toward the close of the decade, the break was on, and even newspaper stories of disaffection on the part of actual and prospective cartel members became not uncommon. At the very time when cartels were holding out their most alluring prospects of a safe if not comfortable journey through stormy seas, a lot of people were rigging up their rowboats with individual outboard motors, and going overside. It will require government coercion to make the British cartel movement anything more stable and predictable than the allegedly chaotic competitive situation from which it is held out as an orderly, rational escape. Left to itself, Lancashire will always be as full of competition as of cartels.

Recent pronouncements by Lord McGowan and certain other leading British industrialists and representatives of industrial associations have been hostile to competition and wholly receptive to cartelization. But contrary opinions very recently have been voiced in *The Times*, *The Economist*, and in the House of Lords, and by observers close to the unfolding British scene. Apparently the wind has changed and the movement toward competition is under way. A few months ago there was some basis for pessimism, but at the moment the British opinion that counts is uncertain and open to argument. Telling arguments, however, will not take the form of academic presentations; what Britain needs in order to muddle in the direction of competition rather than toward cartelization is the logic of performance by the United States. A demonstrated determination on the part of the government of the United States to do its utmost both to break down and keep down governmental barriers to world trade, to facilitate world trade, and to take and to join in posi-

tive measures to establish and maintain world security, will set the stage; and in such a setting, a similar demonstration of our determination to proceed, even unilaterally if necessary, against the private cartelization of world trade has an excellent chance of bringing Great Britain actively into alliance with us. British trade was curling up in the early thirties; industrially she was spent. Post-war Britain, revitalized and in a free world economy, has no business in bed with the cartel covers pulled up over her ears. It is very doubtful that she will be found there, in fact, and we certainly have it quite within our power to keep her out.

Our main problem, and an inescapable one, is Germany. For security reasons we cannot avoid dealing positively with German cartels and German participation in international cartels—and it is delightful to find that what is necessary on grounds of security is thoroughly congenial on grounds of economic welfare.

Just a word about security. It has been demonstrated time and time again in recent months that cartels and combines and patent contracts have been employed skillfully and successfully by the Nazi government as instruments of economic and political penetration, military intelligence and sabotage, in Europe and in North and South America. The horror stories of chemicals, drugs, medicines, hormones, titanium, optical and aircraft instruments, dyestuffs, munitions, aluminum, matches, potash, alkalis, synthetic rubber, magnesium, plastics, glass, and of I. G. Farbenindustrie and its ilk, have been told by Berge and by Borkin and Welsh and in scores of articles and in testimony before courts and investigating committees.<sup>5</sup> Cartels and combines have been the spearhead of German aggression both prior to and since

<sup>5</sup> Wendell Berge, *Cartels: Challenge to a Free World* (Washington, 1944); and Joseph Borkin and Charles A. Welsh, *Germany's Master Plan: the Story of Industrial Offensive* (New York, 1943).



August, 1939; they have constituted the meshwork of the iron net that has bound to slavery all industry in occupied Europe. To stamp out Nazism and to prevent its resurrection it will be necessary to free the world of the possibility that these devices shall ever again be available to the German people. On security grounds alone the cartel in Germany and German participation in international cartels, together with German international combines and German participation in restrictive patent arrangements, must be done away with.

It may be argued on this point that it is childish to permit one's anger over the misuse of an instrument or device to lead to a condemnation of anything beyond the misuse. The cartel, so the argument runs, is entirely neutral in these matters, just as banks or any other kinds of economic agencies are neutral; the fact that any of them can be perverted does not lead reasonable men to condemn the whole array of institutions out of hand. The answer to this is that the cartel is not a neutral institution. It is, by its very nature, designed to slow down production and to promote the interchange of technical information within its own four walls. These are exactly the ends which an aggressive, dictatorial government, with conquest in its eye, would like to see accomplished in lands other than its own—just as long as its own members are free (under the typical cartel clause that releases a member, under compulsion from its government, from cartel restrictions and obligations) to produce to capacity and to withhold information from members in other countries. Restrictions on market areas, a normal feature of cartel operations, serve easily and effectively to stem the flow of strategic items into countries which are likely to be met later on the field of battle; and mutual aid provisions can be operated to impair the effectiveness of an enemy blockade and to reduce the danger of loss of foreign markets. These are normal features of cartel operation: if the

Nazis have made warlike use of the cartel let us say at most that they have adapted it to their ends—not perverted it. But, as was suggested earlier, democratic governments cannot control cartels, and cannot use cartels (contrast the government relationship to cartels in Germany with that of the British government in the thirties). A democratic government which recognizes and accepts cartels cannot decently even be suspicious of their activities. There is much more reason to believe that cartels, once accepted, will take over the government than to believe that a democratic government can recognize and control cartels and remain democratic.

And in conclusion on the point of security, our concern should be not only to forestall a resumption of Nazi activities but, more broadly, to eliminate, through the eradication of private cartels generally, one of the major instruments available to any authoritarian government which seeks aggression and is smart enough to recognize and use an efficient tool ready at hand.

But it is not alone on security grounds that one should base the case against German cartels and German participation in cartels. Because we seek the elimination of all private international cartels and because Germany has been their home, their principal source, their driving force and inspiration, we should take advantage of an opportunity that can come only rarely on this earth—the chance which the fact of a completely conquered Germany will afford us to pull up the whole institution of international cartels by the roots. Here is the physical core of our problem, the real festering point. We shall be on hand and we shall have the means, if we have the will and the courage. So far as our program entails the control internally of Germany, we shall need the consent and cooperation of the other control powers; this means simply that we do not at the moment have a clear field, and that our first steps must be to convince our Allies

of the soundness of the course we propose. But this does not alter the character of the problem, nor need we regard these first steps as different in kind from the steps which we and our Allies must take first in connection with all projects which any of us may have in mind for execution in Germany and which call for joint action on the part of the Allies as a group—steps which would, in fact, be necessary even if we proposed to employ German cartels in our service.

Germany's participation has been an essential feature of such international cartels as we have known, and powerful German domestic cartels and combines have been basic to Germany's dominant position and dominating activity in the international field. Here is reason enough to seize upon the occasion to strike directly, and as powerfully as possible, at cartels within Germany, even if we believe that there can be little in the way of any German domestic cartel problem in the immediate future, and even at the cost of having to plead guilty to the charge of interfering with the traditional economy of the country. Question will be raised in a moment about how traditional the cartel really is in Germany, but here the point is that the acts of the Nazi government since it came into power and the inevitable devastation of the war itself, together with the indisputable terms of the peace that must follow, will combine to remake the economy of Germany much more completely (and unrecognizably) than will the eradication or damaging of domestic cartels. Admittedly it is impossible for any Allied government to impose a completely effective "antitrust" program upon the German people against their will, if by "completely effective" is meant the absolute elimination of all combinations, agreements, and understandings, secret and open. The history of our own antitrust laws supports this proposition. Yet that same history, and the story of the transformation by law of the cartel in Germany, both

under the Republic and under the Nazis, are demonstrations of the equally valid and far more significant propositions that laws are not without effect, and that cartels hounded by the law, driven from pillar to post and forced always into a defensive position, are altogether different and altogether better in character than cartels in the same economic setting, accepted and encouraged by law. Maybe we can't destroy 'em, but we can certainly mess 'em up!

We know of the argument that cartels as presently existing in Germany have not been for many years the same free, untrammelled forms of business organization which they were before the Nazi government absorbed them into its system; that in the hands of the Nazis they have become agencies for the execution of measures of government control—the direction of production and the allocation of materials and products; and that we might be wise to accept them, adapt them to our own purposes and employ them as agencies for the carrying out of the economic controls we propose to institute in Germany. We would not be encouraging monopoly or restriction, but simply taking advantage of a working mechanism that good fortune has provided for our use. No one knows how many cartels have been left uncrushed by Patton's tanks, but we may be sure that in the rubble we can find, or out of the rubble we can create, better and certainly more reliable instruments of control than these. The cartels now in existence in Nazi Germany bear little resemblance to freely formed, voluntary organizations for the prosecution of peacetime business: they are different in purpose, and they certainly are manned by a personnel altogether unsuitable for any peacetime use which we could afford to permit. We may be certain that they would not be spontaneously cooperative; indeed, we may expect that they would serve as centers of intrigue and resistance, operating behind the shield of an accepted insti-

tution, whenever Allied policies ran counter to the desires of the members. Further, even if we were convinced that we ought to be completely neutral in the matter of Germany's organization of her peacetime economy, we shall scarcely be neutral by adding, to whatever status these cartels may otherwise have, the prestige of endorsement and use by Allied authorities. Finally, we shall unquestionably undertake, if only as a measure absolutely necessary from the standpoint of security, the very substantial breakup of major German industrial combines. It will scarcely make sense for us then to permit through the instrumentality of cartels the achievement of purposes which we are unwilling to contemplate as the fruits of forbidden combines. Let us by all means salvage such cartel records as we can discover and make such use of them for purposes of control as may seem fitting, together, incidentally, with the services of any cartel officials whom we may deem to be reliable. But let us employ records and men alike apart from the cartel institution as such. De-Nazification requires more than the unseating of particular persons. We will not forward the cause of effective Allied controls, nor, indeed, the cause of decent self-determination by the German people in matters which we want to leave to their determination, by protecting and employing organizations which we have reason to regard as wholly undesirable in their own right, both economically and politically.

If cartels are "natural" or indigenous anywhere in the world, they are certainly native to Germany. For many decades the German economy has been characterized by cartel organizations enjoying various and varying degrees of prosperity, and German cartels have lain at the center of Europe's variegated international cartel economy, and have, as well, frequently stretched forth an eager hand to grasp the welcoming hand of members in Great Britain and in the United States. Doubtless cartels are

deeply imbedded in the German economy, but this is far from a statement that cartels are, themselves, part of the bedrock. Never in modern times has the German economy been free of cartels, combinations or agreements to restrain trade, and never has the attitude of the German people taken a turn as vigorously opposed to cartels as that taken by the people of the United States. It is interesting and significant, however, to note that the course of cartels in Germany has not been uniformly smooth, that the attitude of the people and of the government has differed at different times, and that the organization and activities of cartels have responded both to changing economic situations and changing laws.

Accounts of the development of cartels in Germany since the 1870s are full of such propositions as these: "The first important cartelization occurred during a period of generally depressed business conditions." "A prolonged depression following a severe crisis, with exaggerated productive capacity facing slackening markets, led to keen competition and in turn to agreements restricting output and regulating sales." "Protective tariffs, promoted by heavy industries seeking to safeguard their over-capitalized concerns against foreign competition, provided an adequate basis for cartelization." "The movement came to an almost complete standstill during an ensuing period of prosperity." "When expansion stopped, a new cartelization movement set in, extending over the period of depression." "The period during which cartelization on a nation-wide scale became basic to important strata of the economic structure comprises two phases of economic contraction." "The home market, though protected against foreign competition, was limited in its power to expand, and expanding productive capacity in various industries endangered the prospects of a profitable market. Such a situation lent itself to the conception of the home market as

something capable of being divided and distributed among the competing firms, as an offset to market weakness.”<sup>6</sup>

We need not concern ourselves to establish the exact scientific validity of each of these statements in relation to the particular cartel development immediately referred to, and still less to maintain that cartels find their sole origin in contracting markets; but in general the development of cartels in Germany can be attributed to the same kinds of forces that have operated elsewhere to promote cartelization. It is probably true that the notion of “ordered” as distinct from “competitive” business is congenial to what we have come to accept as the German mentality, but there is no such thing as an inherited instinct to cartelize, even in Germany. With more favorable prospects for the marketing of the possible output from a highly efficient productive plant than have prevailed for Germany generally in the years of her main industrial development, the urge to protect and divide would have been much less compelling. And the encouragement which the cartel, as an instrument so easily adaptable (and, in fact, so readily adapted) to the purposes of an aggressive government, must have received at the hands of the German government over many decades must not be overlooked in analyzing and appraising the status of cartels in Germany. German laws—reflecting public sentiment generally, we may assume—have been highly favorable to the growth of cartels, but it should be noted that the laws have made of German cartels quite different organizations at different times. It is not merely that the laws have changed, although this, too, is important as reflecting a change or development in public opinion. The point is that cartels have changed—even in Germany. Since 1897 at least, “in the eyes of the German courts, the cartel [has been] a lawful manifestation of the right of entrepreneurs to exercise

<sup>6</sup> These statements are paraphrased from the discussion in Karl Pribram, *Cartel Problems* (Washington, 1935), pp. 241–50.

freedom of contract";<sup>7</sup> and since the cartel decree of 1923, cartels have had "official statutory recognition as legal entities."<sup>8</sup> Nathan notes, however, that while the legal position "may be said to have improved," certain sections of the decree (making it possible under certain circumstances for members to withdraw, and making the application of boycotts against outsiders "very risky") substantially "increased the uncertainty confronting cartel managements."<sup>9</sup> He thinks that not even in conception was the cartel decree "a force that in any basic way changed the official German attitude toward cartels."<sup>10</sup> Yet it certainly *reflects* a change in attitude. Nor should we pass over, as cavalierly as do some authors, the decrees of 1930 and 1931 which gave the government direct power to dissolve agreements and to invalidate price contracts of cartels and to authorize parties to withdraw from contracts which the government considered too restrictive of production or distribution, or of economic freedom, to the detriment of the economy. Particularly in this connection it is worth while to contrast the cartel under Nazi rule with the cartel in the twenties, and to note the changes in structure and functions which, to quote Nathan again, resulted in an organization that "resembled the pre-Nazi organization in name only."<sup>11</sup> There is no need to detail the changes; it needs only to be pointed out that cartels have been greatly reduced in numbers and have been made compulsory, and that the Nazi government has stripped them of their marketing functions and has bent them entirely to its military purposes as quasi-governmental agencies, both in Germany and in occupied countries. There is nothing strange in all this; the point is, simply, that to those who say the cartel in Germany cannot be eradicated, the apparent answer would seem to be: "the Nazis did it!"

There is no need to be completely dogmatic on the matter of

<sup>7</sup> Otto Nathan, *The Nazi Economic System* (Durham, N.C., 1944), p. 65.

<sup>8</sup> *Ibid.*, p. 67.

<sup>9</sup> *Ibid.*, pp. 67, 80.

<sup>10</sup> *Ibid.*, p. 69.

<sup>11</sup> *Ibid.*, p. 64.



the cartel within Germany. Although organizations which have sprung from and been nourished by social, economic and political conditions that have prevailed for many decades may not necessarily be indigenous and "natural," it cannot reasonably be denied that cartels hold a pretty secure position in the German way of doing things, and that they will be difficult to exterminate. But nothing in the circumstances surrounding their development suggests that they are so ingrained in the German character that if they should be removed the result would be fatal to things we desire to see preserved. The task of eradicating Nazism and militarism from German life—a task which we are committed to perform—is fraught with fully as much difficulty, and as much that threatens to destroy the essential qualities of Germany as we know it, as the task of purging cartels from the German economy.

As a first necessary step the Allied military governments in Germany should suspend all domestic cartel operations and commandeer all cartel records. It should institute an investigation, industry by industry, of the case upon which any proposed resumption of cartel activities might be based. It should establish the almost, but not completely, nonrebuttable presumption that at the peace table cartels will be written out of the German economic system; and one may confidently expect that sometime before the writing of the peace, the "almost" will become "completely."

Now, what else should be done to control the German situation?

In addition to striking at internal or domestic cartels, we should move vigorously and effectively to terminate any German participation in private international cartels or restrictive agreements. Such restraints upon the activities of German exporters as it may be desirable to enforce can be provided much more effectively by governmental processes and peace terms than by the maneuverings of private cartels.

Any contracts involving price fixing, production restrictions, division of markets, and the like should be declared wholly inoperative.

With a weather eye to the effect upon any production which, for purposes of reparations, local consumption, trade, or for any other reason, we may want to permit and encourage, we should proceed to such a breakup of German industrial combines—the overlords of iron and steel, nonferrous metals, chemicals, electrical and communications equipment, optical instruments—both internally and in their holdings of interests in or controls over industries in other countries, as will prevent them from serving in any way as instruments either of monopoly or of economic, political, or military aggression. This means subsidiaries, affiliates, contracts, interlocking boards or officials, communities of interest—in formerly occupied countries, former Axis countries, neutral countries and Allied countries—all commercial, financial and corporate relationships extending beyond the borders of Germany. And in the disposition of German industrial properties held abroad every effort must be made to keep them out of the hands of newly developing monopolies.

Finally, there must be an open door for all comers to the rich stores of the German patent office, and access to Germany's vast technical knowledge and "know-how." Patent monopolies and restrictive arrangements based upon patent monopolies presently existing in Germany should be destroyed, and any patent system hereafter permitted in Germany should be so constructed as to achieve what may seem to be desirable in the way of encouraging technical advance, with the least possible aftereffects in the way of monopolies and monopolistic arrangements. The problem here is complicated by difficulties both inherent and legalistic, but we can certainly work our way out of whatever we have allowed ourselves to be worked into.

There can be little doubt that such a program for Germany

will find support generally in other European countries. Certainly Great Britain will resist any restoration of the power of German cartels; and the liberated countries which have witnessed the rape of their industries and industrial institutions by the Nazi conquerors, however legitimated by gun-point contracts and agreements, mergers, and interchanges of securities, will certainly lose little time in repudiating the unnatural arrangements and in moving to forestall permanently any recurrence of the experience. Incidentally, countries like Belgium, France, and Holland, rid of German cartel connections for the first time in recent decades, will be singularly free from the pressures of established vested cartel interests in determining their own official post-war policy on international cartels.

Much of this program will require the full cooperation of the few neutral countries remaining in the world, both to work out the provisions as stated, directly and fully, and also to prevent German industrial controls from operating behind neutral masks. The presumption is not wholly without foundation in recent diplomatic history that ways may be found to bring neutral governments to our way of thinking in this regard.

Very little can be said with assurance as to the probable position of Russia on the treatment to be accorded to German cartels, German participation in international cartels, and the broader problem of an international anticartel convention. There is no apparent reason in the logic of trade or of security to expect that the attitude of Russia will be other than favorable toward the entire program, and such pronouncements from semiofficial sources as are available lend some slight strength to this conclusion. Is there more that can be said, confidently? If the Russian government should prefer for reasons of convenience or otherwise to deal with private monopolies rather than to buy from competing industries in other countries, it will be the duty of the

governments of those other countries—notably the United States—to indicate very positively that they prefer to keep their own economies competitive, even at the cost of losing Russian business and depriving Russia of products which it wants and needs. There is little chance that Russia is hiding in the bushes on this proposition, but if she is, it is a fair guess that she will soon grow tired of eating berries. Recent statements from France, too, are anticartel in leaning, and the French can certainly be said to have no long and deep tradition to overcome on this score.

In short, the situation in Great Britain and on the continent of Europe is such that if the United States feels deeply and is prepared to move boldly and with conviction toward an international agreement outlawing cartels and restrictive patent devices and contracts through which cartel results are frequently gained, and toward a program for Germany which will remove that country as a source of cartel infection and eliminate her cartels as devices for the revival and perpetuation of German aggression, we have a fair chance to accomplish much that we set out to do.

Bear in mind that the United States does not come to this problem hat in hand, trembling, and as a suppliant. We are a powerful industrial and trading nation. We have a very substantial stake in the post-war world, and we are in a position, quite legitimately and without apology either to our neighbors or to posterity, to use our strength and our resources to make that world what we would like it to be. In the matter of cartels, at least, if we have convictions there is little excuse for subordinating them at this stage of the game to the inclinations of any other nation or group of nations in the world. We can move vigorously toward an international agreement to compete; failing its accomplishment we can still have competition by competing. It is not without point, so far as our relationships with other countries are

concerned, that every move we make in any anticartel campaign looks away from isolation and toward a fuller working internationalism.

The answer to the question, "What will be the status of cartels in post-war Europe?" depends, not entirely, but in a very large measure, upon the depth of our own convictions about the desirability of free world trade, and upon our willingness to take the lead in establishing world security and in destroying governmental barriers to world trade, to take the positive steps necessary to facilitate world trade, and then to seek by every means at our disposal, short of military, to destroy all *private* barriers to trade. This is an opportunity of a lifetime; certainly no one is entitled in his own span of years to more than one such chance. We may not win the whole program, but we cannot afford to shoot for less.

Even those persons who can find some positive good in moderate cartel programs carefully supervised by public authority cannot afford now to aim for less than the complete elimination of private cartels in international trade. In the existing state of world politics and in view of the currently developing alignment of pressure forces within the United States, moderation and control find their natural ally, at this juncture, in abolition.

# CARTEL POLICY AND INTERNATIONAL SECURITY

By ROBERT P. TERRILL <sup>1</sup>

## *Cartels as an Instrument of World Peace*

IN VIEW OF the present state of American opinion on this subject, it may seem incredible to venture that restrictive international business agreements have been seriously advocated as instruments of world peace and that in quite recent years attempts have been made to use cartels on a systematic basis to this end. Although no clearly reasoned case or satisfactory exposition of this view has been advanced, the proponents have in general contended that competition should be minimized through the reservation of home markets and the division of export markets in the interests of eliminating frictions between governments and promoting international unity. They have further contended that the conclusion of restrictive agreements between similar industries situated in various states, either on the initiative of these industries themselves or under the leadership of their respective national industrial federations, would also facilitate the reduction of tariffs and other trade barriers and would improve standards of living and wages through cost reductions following from the rationalization of production on an international scale.

It is not possible to present here a complete history of this thesis concerning the relation of cartels to world peace as it was developed and put into practice in the interwar period; how-

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ever, for background purposes a brief sketch of certain highlights seems indispensable. Although the idea of promoting international business through cartel agreements had been advanced before the First World War, it was not until the 1920s that it found prominent supporters among officers of national and international chambers of commerce and industrial associations, officials of various European governments and the League of Nations.<sup>2</sup>

The advancement of proposals for collaboration along this line clearly owes most to M. Louis Loucheur, who for many years held important posts in the French government and the League of Nations. Of his views Grossman reports as follows:

If a friendly atmosphere can be created by a series of agreements within the principal industries in Europe, we shall have penetrated to the causes of all armed conflict, as M. Loucheur suggested to the Assembly of the League of Nations in 1925, and more will have been done for the maintenance of peace than by any conceivable arbitration or disarmament conventions.<sup>3</sup>

It will be recalled that M. Loucheur was also an important figure in the promotion of Franco-German rapprochement between the years 1924 and 1927, which culminated in the Commercial Treaty of 1927 between these two countries and which was accompanied by the formation of certain international cartels of great importance. In this respect the Commercial Treaty of 1927 was probably not unique, and certainly the concurrent negotiation of cartel agreements was not an irrelevant event, since these agreements made it possible to foresee with greater or less certainty the consequences of the tariff rates to be negotiated in the Treaty with respect to exports and imports of various important

<sup>2</sup> For the development of early proposals see Eugen Grossman, *Methods of Economic Rapprochement* (League of Nations, Economic and Financial Section, C.E.C.P. 24(1), Geneva, 1926), pp. 26-27.

<sup>3</sup> *Ibid.*, p. 29.

commodities. In the present case the most important single industry to be reckoned with was, of course, iron and steel, and the Franco-German understanding in this field was embodied in the International Crude Steel Cartel of 1926 which established overall production quotas for the leading producer groups of continental Europe. Other fields of industry important in the conclusion of the Franco-German treaty and coming under cartel control in 1926 were potash, aluminum, dyestuffs and other chemicals, and electrical equipment.<sup>4</sup>

National industrial groups and federations also played a part in the treaty negotiations. For example, in 1926 it was reported that a conference of German and French industrialists had even convened to "supply authentic business information" and to "eliminate reciprocal distrusts." An observer commented to the effect that this could have a large effect on mutual policies of the two countries even though their political representatives were not there.<sup>5</sup>

Meetings between national industrial groups were in fact quite frequent during the period 1924-27. For example, the Federation of British Industries held conferences with German, French, and Italian industrialists in these years. The realistic attitude of the British organization toward international cartels, which it expressed on more important occasions in later years, was typified by the final resolution of the 1927 meeting with its counterpart in Italian industry which reads as follows:

The best and most helpful line of endeavor at the present time . . . is the encouragement of international discussion within each in-

<sup>4</sup> As to the first three items, see United Kingdom, Department of Overseas Trade, Report No. 581 (1934): *Economic Conditions in France*, pp. 146, 234, 389. As to electrical equipment see, for example, U.S. Tariff Commission, Report No. 133: *Incandescent Electric Lamps* (Washington, 1939). The Phoebus Convention which cartelized electric lamps was negotiated in 1924.

<sup>5</sup> *New York Times*, June 22, 1926.



dustry in different countries and of further discussion by the chosen representatives of each rather than as a whole on the lines of the conference already held by the Federation of British Industries with similar organizations in Germany, France and Italy.<sup>6</sup>

The prominent role which cartels were then assuming in contemporary affairs was reflected in the agenda of the World Economic Conference held in 1927 under the auspices of the League of Nations. Although many phases of the subject of industrial agreements were discussed from different points of view, little reference was made to international security or peace in relation to cartels. Apparently the initial objective of the group which had been most active in sponsoring that committee of the conference which dealt with international cartels was to promulgate a plan for review of cartel agreements by some body within or associated with the League of Nations framework.<sup>7</sup> The antipathy of various delegates toward cartels and toward the possibility of cartel regulation on a national or international basis made this project impracticable,<sup>8</sup> and the resolution finally adopted by the Committee on Industrial Agreements merely proposed the study of cartels by the League.<sup>9</sup>

During the course of the conference the view was expressed that the further elaboration of cartels among European industries was necessary to the "winning back of proportionate shares of foreign markets from American industries."<sup>10</sup> This concep-

<sup>6</sup> *The Times* (London), April 7, 1927.

<sup>7</sup> *New York Times*, April 8, April 9, May 6, 1927. See also League of Nations, *Report and Proceedings of the World Economic Conference* (Geneva, 1927), I, 128. The French delegation did, however, present a cartel control plan submitted by M. Jouhaux, head of the French Confederation of Labor, *ibid.*, II, 168. Another plan was presented in the name of the International Cooperative Alliance, *ibid.*, II, 169.

<sup>8</sup> *Ibid.*, II, 126-53.

<sup>9</sup> *Ibid.*, II, 169-70.

<sup>10</sup> The leading exponent was M. Loucheur, for whose views see *ibid.*, I, 132. A German delegate also expressed views as to "the economic sovereignty of Europe as a whole," *ibid.*, II, 136.

tion of cartels as an institution for the economic unification of Europe proved attractive, and within the next several years it was incorporated into various plans for the United States of Europe. M. Edouard Herriot, who argued persuasively on this subject, wrote: "It is no use trying to impose our traditional ideas of politics on a world in ferment, and the urgency for Europe to unite in self-defence is imperative. The producers have long since recognized a necessity which politicians are just beginning to see."<sup>11</sup> M. Herriot concluded, however, that such European industrial groups need not be exclusionist in character: "Concluded in the first place for Europe, these agreements, when they are well established, extend to the other countries of the world, especially the U.S.A. and Japan. (For this latter country see the agreement with the I. G. Farbenindustrie.)"<sup>12</sup>

Significantly, he also concluded that "It is idle to ask whether governments can be theoretically disinterested in these agreements. In fact, as the case of the Steel Trust shows, they are constantly concerned with them."<sup>13</sup>

In the ensuing years of the 1930s this ambivalent relationship which M. Herriot perceived between cartels and the national state materialized within two main contexts: 1) the development of national systems of controlled international trade, and 2) the onset of the European political crisis. The case of France provides a convenient illustration of the new role of national and international cartels under controlled international trade. The following statement expresses the matter concisely:

The French Government, as from September 1931, followed the practice of suggesting to the German Government that, as the imports were abnormally great, the respective national associations in particular trade groups should meet to discuss the best ways and means

<sup>11</sup> Edouard Herriot, *The United States of Europe* (London, 1930), p. 110.

<sup>12</sup> *Ibid.*, p. 152.

<sup>13</sup> *Ibid.*, p. 152.

of reducing imports by a given approximate percentage. The technical advantage of this method was that the trade groups were better informed for adjusting reductions more in accordance with needs and with French capacity of production in specific branches than Government officials. Should the associations have failed to agree on the whole matter, the Government then made its own decisions; if only partial agreement was secured, the Government approved such partial agreement and took its own decision as regards the remainder.<sup>14</sup>

In order to illustrate the operation of a particular cartel with respect to the fixing of governmental import quotas in a particular industry, reference may be made to the case of nitrogen.<sup>15</sup> In view of the breakdown of the European nitrogen cartel agreement in 1930, imports into the French market were placed under government license. The first of such licenses was granted after negotiations between French and German nitrogen cartels had arrived at an agreement as to quantity of production and prices. Subsequently, an advisory committee, including members of the French nitrogen industry, was established to assist the government in the continued regulation of the market. This role of cartel groups in the European countries was, of course, by no means confined to France but became fairly common means by which governments, acting in concert with international cartels, regulated European trade through a system of import, and in some instances export, quotas established by consultation with private producer groups.<sup>16</sup>

In the last year of the interwar period cartels were also put to test as an economic palliative for the European political crisis. In March, 1939, after lengthy preparations<sup>17</sup> the Federation of

<sup>14</sup> United Kingdom, Department of Overseas Trade, *Economic Conditions in France*, p. 553.

<sup>15</sup> *Ibid.*, pp. 387-88.

<sup>16</sup> On this subject consult, for example, Heinrich Hauser, *The Control of International Trade* (Philadelphia, 1939).

<sup>17</sup> See *New York Times*, March 16, 1939.

British Industries and the Reichsgruppe Industrie met at Düsseldorf and concluded an agreement which has recently received attention in this country. The agreement was of the "master" cartel type, establishing with governmental approval<sup>18</sup> an overall framework for agreements between British and German firms in particular industries as to prices, market areas, and related aspects of international competition. The quasi-governmental character of the agreement was evidenced by the following passage:

The two organizations realize that in certain cases the advantages of agreements between the industries of two countries or of a group of countries may be nullified by competition from the industries in some other country that refuses to become a party to the agreement. In such circumstances it may be necessary for the organizations to obtain the help of their governments, and the two organizations agree to collaborate in seeking that help.<sup>19</sup>

The agreement, it may be noted, was not received with enthusiasm either by the press or in Parliament,<sup>20</sup> and owing to the character of subsequent political events, it was not further implemented.

However, another master agreement conceived in a quite different setting in March of the following year was entered into by the Federation of British Industries and the Confederation Generale du Patronat Français. This agreement, negotiated after a series of accords had been reached between the two governments concerning common economic measures for the prosecution of the war, provided as to long-term arrangements the following:<sup>21</sup>

<sup>18</sup> Great Britain, House of Commons, *Parliamentary Debates*, Vol. 343 (London, 1939), p. 730.

<sup>19</sup> *Economist*, March 25, 1939, p. 607.

<sup>20</sup> *Parliamentary Debates*, Vol. 343, pp. 730 f.

<sup>21</sup> *The Times* (London), March 9, 1940. The quotations given are not consecutive.

. . . The two organizations are agreed that negotiations should be undertaken as soon as possible between individual industries, not only to promote co-operation during the war, but also to serve as a permanent feature in economic relations between the two countries.

. . . The two delegations have decided to constitute themselves into a permanent Anglo-French Industrial Council which will maintain and develop the relations established by this Agreement, and take the requisite action thereon from time to time.

. . . The first task of this Council will be to investigate the extent to which individual industries in France and Great Britain are in a position to enter into negotiations on matters of common interest, and to arrange for such negotiations.

. . . The two Organizations express their desire and intention of securing as soon as possible participation in this policy by other countries willing to accept the principles and the obligations involved.

The fate of this arrangement was similar to that of its immediate predecessor concluded at Düsseldorf; the fall of France in June, 1940, rendered it impossible to implement the accord through formation of a series of international cartels in particular industries.

In summary, it appears difficult to escape the conclusion that the international cartel movements, in this phase of its development, failed singularly to support the expectation that cartels would promote the cause of durable peace. Proponents might, of course, argue that the experiences of the lengthy interwar period were inconclusive owing, for example, to an incomplete coverage of world industry by cartel arrangements. However, this contention probably has little merit; although there were undoubtedly certain areas of industry which escaped the discipline of cartel control most students of the subject seem agreed that such control attained significant proportions. Unfortunately, no meaningful statistical measure can be devised to

express this phenomenon in quantitative terms;<sup>22</sup> however there were probably few important commodities in intra-European trade which by the middle 1930's were not subject to regulation as to conditions of competition through the direct or indirect mediation of cartels.<sup>23</sup> European exports to countries overseas were, of course, significantly less under control both as to the range of commodities covered and the effectiveness of concerted measures. Nevertheless, particularly in the newer industries where patents and technical agreements existed, the controls were substantial. Under these conditions the question arises, why were the expectations of the proponents not borne out?

Perhaps the most general answer to this question is that international cartel agreements do not forthwith, as frequently assumed, eliminate the competitive process. Instead, it is more likely that competition between individual firms as to prices, quality, and similar matters will be superseded by concerted bargaining between national groups that employ the tactics of strategy and maneuver, and invoke tacit or open assistance from their respective governments. Such disturbances are most severe at the time of negotiating a new agreement or renegotiating one which is about to expire. The longer the duration of an agreement and the more effective it has been in suppressing competitive adjustment, the greater will be the economic and social repercussions of a rupture between the participants. Under

<sup>22</sup> Calculations which purport to show the percent of total world trade "controlled" by cartels are vitiated by the lack of homogeneity of the data. See for example the estimates of Frederick Haussmann and Daniel Ahearn, "International Cartels and World Trade," *Thought* (Fordham University Quarterly), Sept., 1944, pp. 421-40. The reader will note that these authors have also introduced the illusory refinement of carrying their arithmetical operations into the decimals.

<sup>23</sup> See, for example, Laurence Ballande, *Essai d'étude monographique et statistique sur les ententes économiques internationales* (Paris, 1936).

these circumstances drastic protective measures may be resorted to on the part of governments to shelter their respective national industries, and the producer group which is in the strongest initial position in this respect may possess a considerable leverage in renegotiation proceedings.<sup>24</sup>

Furthermore, if producers in other countries are outside the agreement, resort is commonly made to dumping in the domestic or foreign markets of the independents. Or if the producing groups have for various reasons achieved effective administrative control over a commodity, their price policy may be a source of grievances on the part of purely consumer nations and may result in a search for defensive measures. If the commodities in question are substantially derived from reproducible resources, or if synthetic substitutes are available, production may be so increased as to cause the collapse of the original control scheme and a period of "ruinous" competition calling for national intervention to protect the newly developed sources of supply.

Also, as previously mentioned, the relation between cartels and national policies is not uniformly one-sided. Political interest and hegemony on the part of governments may exert a decisive influence on the terms under which their respective national groups enter into restrictive international arrangements. The most obvious case arises with respect to the allocation of foreign market territories between the major producing firms in question, this being a particularly common feature of agreements involving patents and technology. Producers situated in countries possessing overseas colonies, mandates, or protectorates frequently reserve such territories as their ex-

<sup>24</sup> For an extensive discussion of the relation between cartels and protectionism see League of Nations, *International Industrial Agreements*, No. E. 736 (Geneva, 1931), pp. 28-33.

clusive markets, thus nullifying to that extent any "open door" pledges or policies which may exist.

While there is nothing in this general appraisal which is particularly novel or which could not be elaborated at much greater length, it appears sufficient to cast serious doubt on the thesis that international cartels serve to promote international peace and security. Undoubtedly there have been instances, particularly during the world depression, where two national producer groups reached understandings as to the limitation of exports into each other's home market, thus avoiding possible tariff or quota impositions by their respective governments. However, even such arrangements contribute to the same aggregate effect as do other and outwardly less benign restrictionist plans, namely, the shifting of the burden of unemployment and intensified foreign competition onto the unsheltered industries or areas of the world, thus giving rise to rivalries and political tensions elsewhere. Moreover, bilateral pacts between powerful national industrial federations establishing under governmental auspices a framework for the conclusion of manifold cartel arrangements would seem to compound the adverse possibilities noted above. In place of more or less isolated cartel "battles," full-scale economic warfare would always be at least in prospect, with the probability that once joined there could be no turning back. One must therefore conclude, in respect of this area in which foreign economic affairs merge with the political, that the cartel device offers little promise of success and great possibilities for serious disturbances to good international relations.

### *Cartels and the National Security*

Public interest in international cartel problems derives in no small measure from disclosures concerning German participa-



tion in arrangements with American firms and their bearing on the national security. Interest has been sustained in recent weeks by official disclosures concerning possible uses of cartel and corporate arrangements by the Germans in the post-war period for purposes of retaining a surreptitious foothold in world industries and markets, and assuring a "safehaven" for valuable rights and interests which might otherwise come under United Nations seizure or control.<sup>25</sup> In this section it is proposed to consider briefly the background of this phase of the cartel problem and to suggest its bearing on certain questions of policy.

As to the background of German association with international cartels, most readers are doubtless familiar with general works that have appeared since the early 1920s and that describe the formation of various international cartels and combines.<sup>26</sup> This development was of course part of a much wider process of reestablishment and extension of contracts and corporate acquisitions after the First World War which was essential to the growth of the framework of world trade and finance. Some idea of the magnitude of German corporate acquisitions abroad can be inferred from official German statistics of annual capital movements. From this source it would appear that German foreign investments had become substantial by the year 1928, when the outward movement of German capital totaled 2,852,000,000 marks in contrast to a figure of 854,000,000 in 1927 and 118,000,000 in the preceding year.<sup>27</sup> This movement

<sup>25</sup> See *New York Times*, March 31 and April 29, 1945.

<sup>26</sup> See, for example, Louis Domeratzky, *The International Cartel Movement* (Washington, 1928); Robert Liefmann, *Cartels, Concerns and Trusts* (New York, 1932); U.S. Senate, Special Committee to Investigate the Munitions Industry (Nye Committee), Hearings (73d Congress, 1934-36); U.S. Senate, Committee on Patents (Bone Committee), Hearings (77th Congress, 1941-42).

<sup>27</sup> As to aggregate amounts of foreign investment in Germany in contrast with German investments abroad, see "Report of Committee of Experts" (Wiggin

continued in substantial volume until 1935, although after 1930 the proportion represented by "stocks and other long-term investments" declined markedly with respect to nominal "short term" investments.<sup>28</sup>

It should also be noted that German capital imports, representing in part corporate participations in Germany by foreign residents, were generally much greater than the corresponding exports in the decade 1925-35.<sup>29</sup> The same generalization is true of foreign purchases in Germany of "stocks and long-term investments," except that in the three years 1929, 1931, and 1932 German acquisitions abroad in this field exceeded or were substantially equal to foreign purchases in the Reich.

The growth of the aggregate of international contracts and arrangements is not, of course, reflected adequately in balance of payments statistics. However, world traffic in such legal documents undoubtedly assumed great proportions in the inter-war period. It should also be emphasized that in this field, as well as in the case of corporate acquisitions, the process was reciprocal with respect to Germany and other nations. Foreign nationals and firms acquired large interests in German industry, frequently on a "mixed" basis with German nationals, in such lines as automobiles and trucks, agricultural implements, office machinery, communications equipment, hardware, artificial fibers, margarine, soap, petroleum distribution, ball bearings, electrical equipment, and illumination apparatus. It should also be noted, and indeed emphasized, that German preeminence in

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Committee), as cited in the *Economist*, Special Supplement, Aug. 22, 1931. For brief mention of the monopoly consequences in Germany, see Karl Pribram, *Cartel Problems* (Washington, 1935), pp. 257-58.

<sup>28</sup> It will be recognized that short-term assets acquired abroad may be converted into "direct" or other long-term investments; the converse is possible though less likely in the case of foreign assets initially acquired in the form of long-term investments.

<sup>29</sup> The years 1932 and 1933 are exceptions.

cartel contracts, particularly those pertaining to patent licenses, was greatest in those lines in which German research or production facilities were outstanding. This was the case with particular reference to the fields of chemicals, drugs, dyestuffs, processes for refining or compounding metals, optical equipment, and to a lesser extent iron and steel. In chemicals and related products I. G. Farbenindustrie became truly ubiquitous throughout the world through the maze of its international corporate structure and cartel proliferations.<sup>30</sup>

Throughout most of the interwar period this development not only was viewed with complacency but, in many quarters was enthusiastically received. Certain restrictive agreements and corporate participations were, of course, not known to the public, but many of the most important were publicized in the financial pages of leading American, British, French, and German newspapers and periodicals as well as in official documents. Outstanding examples of the latter are the *Enquête-Ausschuss* concluded by the German government in 1930<sup>31</sup> and the Nye Committee hearings concluded by a special committee in the United States Senate in 1936.<sup>32</sup>

With the rise to power of the Nazi government in 1933 this network of corporate and contractual relations, developed during the era of German political weakness, not only remained undisturbed but new accretions and ramifications were added, no doubt under increasing scrutiny and direction from the

<sup>30</sup> See, for example, "The Cartel," by Howard Ambruster, an article prepared for the *Encyclopedia Americana* and printed in the *Congressional Record*, March 6, 7, and 8, 1945; see also, U.S. Senate, Kilgore Committee, Report No. 4: *Cartels and National Security* (Washington, 1944), Part II, pp. 69-73.

<sup>31</sup> *Ausschuss zur Untersuchung der Erzeugungs und Absatzbedingungen der deutschen Wirtschaft* (Berlin, 1930). For the agreement concerning petroleum chemistry, see *ibid.*, III, 135; and see also *New York Times*, Nov. 24 and Dec. 2, 1929.

<sup>32</sup> U.S. Senate, Nye Committee, Hearings; see Index, Part 40, for various cases.

Nazis. In retrospect it would appear that, from the moment German aggressive attentions, and still more evidently German aggressive power, became known, the continuation of these as well as other commercial relations was disadvantageous to the security of peace-loving nations. Such relations assisted Germany to gain the time and sustenance to lay up stockpiles of certain strategic commodities, develop synthetics, construct plant and equipment, and engage in economic and political penetration abroad.

Nazi manipulation of international cartel arrangements and intercorporate relationships between German and foreign firms thus represents a special case of use by the Nazis of instrumentalities developed on the premise of a peaceful and cosmopolitan commercial system based on the principles of equal treatment of foreigners and due process of law. Congressional committees and the Department of Justice have recounted in detail the bearing of such cartel manipulations on the national security with particular reference to restriction of production and productive capacity; inhibition of research in this and other allied countries; restriction of exports as to quantities or market areas; transference of technological information of military significance; intermingling of corporate interests; and confusion of national corporate identities through subsidiaries situated in neutral states.<sup>33</sup>

Although it might be possible to argue from case to case con-

<sup>33</sup> U.S. Senate, Bone Committee, Hearings (1941-42); U.S. Senate, Kilgore Committee, *Cartels and National Security*; and complaints brought by the Department of Justice in behalf of the United States against various corporate defendants in the cases of petroleum and synthetic rubber technology, magnesium, plastics, tungsten carbide, titanium, and other products. For brief summaries of these cases see, for example, Guenter Reimann, *Patents for Hitler* (New York, 1942); Joseph Borkin and Charles A. Welsh, *Germany's Master Plan* (New York, 1943) and bibliography cited therein; Wendell Berge, *Cartels: Challenge to a Free World* (Washington, 1944).

cerning matters of detail and the quantitative significance of particular arrangements in affecting the American war potential,<sup>84</sup> it is questionable whether any useful purpose would be served thereby with reference to future policy. There is, however, one important *caveat* to be emphasized, namely, that the problem of restrictive agreements and practices in international trade should not be identified or confused with the Nazi revolution and its consequences, even though the Nazis did derive benefits from such cartel arrangements. The background presented in the foregoing parts of this chapter should caution the reader against undue emphasis on the specifically German character of international cartels and similar arrangements. The matter of perspective in this instance is important since an inaccurate judgment might be conducive to the acceptance of either of two undesirable alternatives: 1) the elimination of pre-war German participation in international cartel arrangements might create the illusion that the undesirable features of international cartels had been eliminated and that further measures were unimportant or superfluous; or 2) the approach to future policy might be biased in favor of highly nationalistic policies involving discriminatory treatment of foreigners and other measures inconsistent with a liberal and constructive world economy.

As to the first of these possibilities, pro-cartel spokesmen in the United States have already suggested that Nazi influence must be eliminated, after which event international cartels will become acceptable institutions. One writer points out that "The first job to be done is to break up the German dominated cartel system which the Nazis have imposed on European [*sic*] industry in the past four years and to destroy the power of the

<sup>84</sup> See, for example, J. Anton de Haas, *International Cartels in the Postwar World* (New York, American Enterprise Association, 1944), pp. 35-39.

huge monopolies in both Germany and Japan." He adds that this problem must be tackled first, "if a scramble for control of the German cartels by separate members of the United Nations is to be avoided."<sup>85</sup> The author then proceeds to advocate the formal acceptance of international cartels with governmental control as to the participation of American firms.

As a further development of the same line of thinking, it has been suggested that German industry should be required, if necessary, to participate in post-war international cartels which would be "controlled" in the interest of world security. The following quotations are in point:

In the final disposition to be made of Germany strict control over Germany's industrial activity must form part of any plan to prevent Germany from outstripping its neighbors industrially and from becoming once more a danger to the peace of Europe. This economic control will of necessity consist of control over specific groups of industries. Their productive capacity and their export activities must be supervised. This can be done by government agencies. It can probably be done with far greater skill by international combines in the respective industries.<sup>86</sup>

In controlling the economic development of Germany and in fitting German production into the complex of the world's economic life, close cooperation of the world's industry will prove exceedingly useful.<sup>87</sup>

If it were accepted that cartels became inimical to national and international security only or mainly because of Nazi influence, a superficial plausibility at least might be given to such proposals as these. If, however, the analysis of the relationship

<sup>85</sup> Milo Perkins, "Cartels: What Shall We Do about Them?" *Harper's*, Nov., 1944 (reprinted in *Reader's Digest*, March, 1945).

<sup>86</sup> J. Anton de Haas, *International Cartels*, p. 41.

<sup>87</sup> *Ibid.*, pp. 49-50. These excerpts are reprinted by permission of the American Enterprise Association, publishers.

between cartels and security as presented in this chapter possesses any validity, then such approaches would appear decidedly unpromising.

Furthermore, a misinterpretation of the thesis that cartels were Germany's "master plan" or "secret weapon" might even militate against successful long-run elimination of German influence. It appears likely that in accordance with the Yalta declarations the United Nations governments may be disposed to seize and liquidate German assets and interests abroad with a view to applying at least part of the proceeds to reparations. Such a measure would be effective in eliminating a proportion of the existing basis for German economic influence in United Nations countries, whether secured through cartels or other means. If German interests in restrictive contracts affecting United Nations countries were also to be eliminated, as for example through a uniform policy of abrogation, the remaining influence of German nationals would probably be quite insignificant and the revival of Nazi economic power from this source quite unlikely. However, such measures as these are not, by themselves, sufficient as long-run future safeguards. They would provide only for the period, whatever may be its duration, until Germany is again restored to a place, conditional or unconditional, in the family of nations. After this time, question must arise as to measures which may be taken to prevent a repetition of Germany's pre-war activities in the cartel field. It is at least open to doubt whether, in the absence of an effective international program directed to the elimination of monopolistic or restrictive business practices in international trade, the nationals of a future German state could successfully be controlled as to contractual relations with firms in other countries or as to the establishment of subsidiaries abroad. One is there-

fore led to venture that the long-term solution of German participation in international cartels and combines cannot be implemented entirely by measures pertaining exclusively to German nationals. The simple and effective approach to this problem is rather through a multilateral program of the character mentioned above.

With reference to nationalistic measures that might follow from excessive preoccupation with the Nazi aspects of cartels, it appears that the most probable excesses would pertain to the treatment of foreign nationals in their legal and commercial rights and to the exchange of technology between American and foreign parties. For example, proposals have been advanced calling for discrimination against the rights of foreigners in United States patents by the requirement of special licensing provisions for such patents. Whatever plausibility this remedy for restrictive cartel practices affecting national security may possess should be dispelled by two considerations: 1) it could be easily evaded by assigning foreign-owned patents to American corporations controlled by non-nationals; 2) it would invite retaliation in foreign countries against the rights of American nationals. As the nation which carries on the greatest amount of research and engineering development in the world, we would probably stand to lose considerably more by such retaliation than we might gain, even though the expectations of the proponents of discriminatory treatment of foreign patent owners were fulfilled. Furthermore, foreign-owned patents in the United States constitute a far smaller proportion of the total than in any other country of the world. Patents granted to foreigners constitute on the average 13 percent of the total number of patents granted in the United States in contrast with 25 percent in Germany, approximately 50 percent in France



and England, 80 percent in Holland, and 90 percent in Belgium.<sup>38</sup> Also, the proportion of total United States patents granted to residents of the leading foreign countries is less than the proportion of total patents granted to United States residents in those countries.<sup>39</sup> Canada is an extreme case, her nationals receiving only 1 percent of United States patents issued while United States residents receive 66 percent of total Canadian patents issued. Great Britain issues 14.6 percent of total patents to United States residents, whereas only 2.6 percent of American patents are issued to the British. Germany approaches nearest to equality with the United States in this respect, granting 6.6 percent of her total patents to United States residents, while in the United States residents of the Reich receive 4.8 percent of the total.<sup>40</sup>

Question finally arises whether anticartel measures specifically formulated with reference to United States security as opposed to general commercial policy would be essential. The following considerations suggest that the answer to this question is probably in the negative since the United States government now has at its disposal a number of means to implement a unilateral policy in this respect. First, it has recently been demonstrated that enforcement of the Antitrust Laws in respect of international cartels can effectively remove restraints on commercial activity imposed by cartel agreements, and it is perhaps unfortunate that such enforcement has not always been as prompt and vigorous as in recent years. The number of

<sup>38</sup> Temporary National Economic Committee, Hearings, Part III: *Patents*, Exhibit 213.

<sup>39</sup> *Ibid.*, Exhibits 210 and 212. Statistics based on annual averages for the years 1930-37.

<sup>40</sup> German and Swiss residents, however, take out a greater absolute number of United States patents than are granted to United States residents by these countries, respectively.

successful cases prosecuted in which German firms, and in particular the I. G. Farbenindustrie, appear as defendants or co-conspirators indicates that antitrust action was a serious if not decisive handicap to the execution of Germany's "master plan," particularly in the United States.<sup>41</sup>

Second, under the Trade Agreements Act, as amended in 1943, this government can deny the benefits of the act to any government which promotes cartel activities adverse to American commerce.

Third, it should be remembered that ownership of a United States patent by a foreign national or a licensing agreement by such national to an American party does not estop this Government from unlimited use of the patent in question. In contrast to the legal rights of a private party, a government contractor incurs no liability for violating the terms of a patent license or for using technology covered by a patent which the contractor does not possess.<sup>42</sup>

Fourth, as to agreements restricting American parties from performing some action not subject to patents, the government also has sovereign rights which can prevent the operation of the contract by relieving the American party of legal responsibility as well as by rendering void restrictive provisions of the contract. For example, in the case of an American party having contracted with a foreign party to sell commodities or disclose technology, an executive order or legislative decree can relieve the American party of legal responsibility for failure to perform. The case of an embargo sustained only by the proclamation of

<sup>41</sup> For a list of recent antitrust actions see U.S. Senate, Kilgore Committee, Report No. 4: *Cartels and National Security*, Part II, pp. 41-60.

<sup>42</sup> The owner or licensor of the patent can, of course, bring suit for claims against the United States government in such cases. See *United States Code Annotated*, Title 35, Section 66; see also, U.S. Senate, Bone Committee, Hearings (1941-42), Part I, pp. 54-55, for discussion.

an administration agency is less certain and was under legal test at the time of Pearl Harbor.<sup>43</sup>

Fifth, as a result of the program of plant construction for war purposes, the government will possess much surplus plant capacity of a strategic character which it can maintain in stand-by condition for emergency use. And in arrangements for the disposal of such surplus it is the duty of the Attorney General to investigate with a view to ascertaining that monopoly is not thereby promoted.

Sixth, the government has powers under present emergency legislation to stockpile strategic commodities, and it is likely that such powers will be made permanent by legislation in order to guard against the consequences of being cut off from sources of supply of certain products.

Finally, there is a distinct prospect of continuing in some form the present activities of the government in carrying on or promoting research activity relating to the national defense. This should make possible the pursuit of a selective policy for military needs without complete reliance on ordinary commercial incentives, which, as experience has demonstrated in certain instances, may not materialize before the hour of critical need has arrived.

Thus, through appropriate use of existing governmental techniques the military security of the United States can be safeguarded without taking measures that might adversely affect a program for the restoration of a multilateral and nondiscriminatory system of world trade and commerce. In the larger

<sup>43</sup> In this instance, the Department of State on Dec. 20, 1939, had declared that further delivery of certain types of petroleum refining technology to certain countries was not in conformity with the national interest, and had so informed particular American companies. The Japanese party to a contract calling for such delivery brought suit against the American party when the latter refused to make further disclosures of technology.

sense of international peace and security the view expressed in this chapter is that restrictive international agreements and combinations necessarily constitute a disturbing factor, the elimination of which by cooperative action among the nations of the world should be eagerly sought as a post-war goal. The third article of the "Economic Bill of Rights" which Franklin Roosevelt announced in his message to Congress on January 11, 1944, is fundamental to a peaceful system of world economic collaboration, namely, "The right of every business man, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad."

# EXPERIENCE WITH UNILATERAL ACTION TOWARD INTERNATIONAL CARTELS

By THEODORE J. KREPS <sup>1</sup>

**A**N EARLIER PAPER defined international cartels as business arrangements in international commerce which have the purpose or effect of reducing or eliminating competition. It explained the diverse content and form of such arrangements, estimated their number, indicated the varied industries affected, analyzed the economic forces that engender cartels, assessed relative advantages and evils, and emphasized that government participation in, and supervision of, cartels intensified rather than remedied their injurious economic effects.

This paper will draw on a different type of experience. The spotlight will be shifted from cartels as such to the varieties of unilateral action here and abroad which they have stimulated. The record is complicated and voluminous, the summary in this chapter necessarily incomplete and fragmentary.

Four questions will be raised. First, what is the power element limiting the success of unilateral efforts to achieve social control of international cartels and what is its magnitude? Second, what types of unilateral action have been most generally tried? Third, in what important ways has unilateral action failed? Finally, can it do the job alone or will it have to be supplemented by other remedial measures?

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*The Generating Problem—Business haute politique*

Many international cartels, especially those in depressed industries with large unutilized capacity, are weak, constantly subject to disruption because of opportunistic individual action, new competition, internal squabbles for larger slices of the market, and recurrent misunderstandings arising from differences in language, business customs, and national loyalties. Like all such arrangements they have to make the proposition interesting, that is "stabilize" prices high enough for the highest cost member. Markets over which an umbrella is thus held are regarded in the jargon of alert foreign traders as "white meat." Such international cartels are even unable to stand against the unilateral action or defection of individual members.

Suppose that all are held in line, but that one or more of the participants has been unable to achieve a monopoly in his home market. If the portion not cartelized is substantial, competition, actual and potential, may still function with appreciable effect. There may be periods of stable prices followed by breakdowns the more drastic because of previous controls. Such was notably the case in the early thirties,<sup>2</sup> for example, in copper, coffee, rubber, and tin. Competition kept breaking through.

Let us now assume that every participant has achieved complete domestic monopoly, but that American producers are not represented. Is the American business concern then pitting its strength against a cartel colossus of vastly superior financial and productive resources? Ordinarily not. Though the cartel fabricators coalesce the economic might of several European countries, the actual volume of sales, plant capacity, or physical out-

<sup>2</sup> For an excellent discussion of the way in which cartels and other restrictive control schemes intensified the evils of the 1932 collapse, see Lionel H. Robbins, *The Great Depression* (London, 1934), especially p. 182.

put is frequently less than that controlled by a single American concern.<sup>3</sup>

Formidable lists<sup>4</sup> of international cartels have been compiled, particularly by those hunting support for the thesis that modern technological gigantism will soon absorb all small enterprise and require the substitution of planning for competition. Invariably a large number of relatively unimportant cartels are included, such as the agreement between certain Belgian and German producers concerning the amount of building stones each will export into the Dutch market.

At no time have international cartels controlled a larger fraction of world trade than in the period from 1929 to 1937. That was the era when European nations under the leadership of a highly cartelized Italy and Germany, Latin American countries under the pressure of dislocated foreign exchanges, Great Britain under the spell of rationalization and self-government of industry, and, for a brief interval, even the United States under the National Recovery Administration, permitted, encouraged, and experimented with organized business action and concerted agreements among producers as devices for "stabilizing" commodity markets and controlling competitive conditions.

Yet even in that period the fraction of world trade controlled by international cartels and combines remained relatively small. Inasmuch as "control" permits of such diverse interpretation, statistics of measurement are necessarily treacherous. Accord-

<sup>3</sup> Much has been made of this point by European apologists for their cartels. "No statesman or legislature would lightly dare," said one of Germany's eminent lawyers, "to confront the big American trusts with an unorganized industry whose members compete bitterly with each other." (Franz Klein, in a speech before the 26th Congress of German lawyers as reported in *Deutschen Juristentagen*, III, 299.)

<sup>4</sup> See, for example, Laurence Ballande, *Essai d'étude monographique et statistique sur les ententes économiques internationales* (Paris, 1936).

ing to one estimate <sup>5</sup> only 10.2 percent of world trade was controlled by cartels in manufactured goods between 1929 and 1937; 7.6 percent by agricultural cartels; 4.5 percent by cartels in metals and minerals; and 11.4 percent by integrated combines operating independently of cartels. Even if these figures contain no overlap, the fraction of world trade in which international cartels were a significant factor was barely more than a third.

How tenuous the "control" may be can be inferred from the large percentage shown for agricultural products. Wheat and sugar are included, presumably because of the existence of international commodity agreements formally ratified by the United States and other producing and consuming nations. But were these agreements effective? How make allowance for the impact of domestic measures, such as crop controls under the AAA? Do the facts clearly show that not only within the boundaries of the United States but in international markets prices were higher and outputs lower, because of commodity agreements? Did these "control"? The answer is by no means unequivocally in the affirmative.<sup>6</sup>

Whatever may be the degree of effectiveness when the United States is a full participant, the fact is irrefutable that the mere failure on our part to enforce the commodity agreement would ordinarily break up such precariously maintained cartels. To cartelize industries in which there are thousands and hundreds of thousands of individualistic competitive producers and burdensome surpluses is not easy. Such agreements contain very

<sup>5</sup> Frederick Haussmann and Daniel Ahearn, "International Cartels and World Trade: an Exploratory Estimate," *Thought*, Sept., 1944, pp. 421-40.

<sup>6</sup> See, e. g., on coffee, Vernon D. Wickizer, *The World Coffee Economy* (Palo Alto, Calif., 1943), p. 258. On wheat and cotton see Joseph S. Davis, "International Commodity Agreements in the Postwar World," *American Economic Review*, Supplement, March, 1942, pp. 391-403.



little of the real international cartel problem, no matter how much some confused analysts keep muddying public discussion by disproportionate emphasis on similarities in form.

The only international cartels that can resist or defy unilateral action by the United States are those similar to the aluminum or the electric-lamp bulb cartel, in which a mere handful of producers not only exert dominant leadership in their domestic markets, but dictate world prices, limit world output, and allocate world markets, fortifying each other in such favored positions by use of sheer power applied to influence and control of governmental personnel, national administration, and legislation, by sanctions held over potential competitors in the form of threatened patent infringement suits, loss of bank credit, cut-throat or guerilla competition, and by pressure-group tactics directed against liberal and democratic movements which are seeking to make irresponsible concentrations of economic power subject to the consent of the governed.

The dominant drive of these cartel-operators is agglomerative. Their efforts result in a series of supranational economic states, commodity by commodity, each with its own government, its own rules of doing business, its own sanctions and trade barriers, superimposed on, and interlaced with, one another in labyrinthine complexity. The domain of power is technological rather than geographic and is extended by getting control over industrial "know how," patents, scarce deposits of raw materials, and markets. The boundaries that count in forming these commodity empires are not those of the political state but those of the international market.

The problems raised thereby are not only national but global: How can the exercise of concentrated economic power, whether on a national or an international scale, be made responsible to the consent of those governed? In areas where competition no

longer vouchsafes maximum production, employment, and service to the consumer, how can social performance by business<sup>7</sup> be secured? When power becomes concentrated in the hands of an international cartel, how make sure that its operators scrupulously refrain from injuring the interests of those not represented, the consumers, laborers, farmers, small nations? How can cartels be guided or influenced to indulge to the minimum the deeply human propensity to enjoy and exploit strategic positions?<sup>8</sup> Can the disadvantaged groups be protected without establishing formal sanctions possessing coercive power?

As I have elaborated elsewhere,<sup>9</sup> the problem-creating force in international cartels is business *haute politique*;—namely, that large element of naked power in international business transactions which causes international competition in some industries to resemble a conflict of commercial great powers exhibiting all the characteristics of militant diplomacy carried on with financial and brute force in the background. When the reins of control in an international cartel are closely held, the individual nations usually find unilateral action difficult and inefficient.

Fortunately, the fraction of world trade thus tightly controlled is much less than the figure of one third mentioned above.

<sup>7</sup> For definitions of this concept and an attempt to measure it for 22 individual industries and for the economy as a whole, see Temporary National Economic Committee, Monograph No. 7: *Measurement of the Social Performance of Business* (Washington, 1940), especially pp. 2-5, 109-17.

<sup>8</sup> The problem here is the age-old problem of power versus responsibility, of using self-government in industry, and corporate bureaucracy to achieve social goals. For an excellent discussion see Temporary National Economic Committee, Monograph No. 11, by Marshall Dimock and Howard K. Hyde: *Bureaucracy and Trusteeship in Large Corporations* (Washington, 1940), especially pp. 181-35.

<sup>9</sup> "Cartels, a Phase of Business Haute Politique," *American Economic Review*, Supplement, March, 1945, pp. 297-311.

The remainder, certainly more than two thirds and possibly as much as 90 or 95 percent of world trade, if bedeviled at all by the problem of business *haute politique*, can probably be liberated and kept substantially free from restrictive cartel arrangements by American industrial competition and governmental action.

### *Types of Unilateral Action*

How nations individually tackle international cartels depends on a number of factors: on the type of business arrangement involved, the administrative and legal machinery available, the industrial and market structure of the controlled commodity, the conservative or liberal complexion of public opinion, and last but by no means least the sensitivity, social conscience, adaptability, and intelligence of the powerful business executives operating the cartel.

Varying types of international cartels naturally call forth different types of unilateral action. Trade-mark and patent licensing agreements, for example, such as those dividing chemical and oil technology between I. G. Farbenindustrie and Standard Oil of New Jersey, have not only stimulated considerable diversity in patent legislation,<sup>10</sup> but have been successfully attacked by action of the Alien Property Custodian<sup>11</sup> and the Federal Courts.<sup>12</sup> Organized associational activities such as those of the United States Alkali Export Association can be kept in line by enforcement of the antitrust laws and at most by some amendment of the Webb-Pomerene Act.<sup>13</sup> Intergovern-

<sup>10</sup> See, for example, Jan Vojaček, *A Survey of the Principal National Patent Systems* (New York, 1936).

<sup>11</sup> See U.S. Office of Alien Property Custodian, *Catalog of Vested Patents* (Washington, 1942), loose leaf.

<sup>12</sup> See Laurence I. Wood, *Patents and Antitrust Law* (New York, 1942).

<sup>13</sup> For an able analysis of this problem see the article by Sidney A. Diamond, "The Webb-Pomerene Act and Export Trade Associations," in *Columbia Law Review* (Nov., 1944).

mental commodity agreements, ineffective in the absence of forceful, positive action, can usually be defeated by a do-nothing policy.<sup>14</sup>

But in the case of strong international combines such as Imperial Chemical Industries, Ltd., or communities of interest like the *Interessengemeinschaft Farbenindustrie*, or informal understandings such as that between the Aluminum Company of America and Aluminium, Ltd., of Canada (which runs the world aluminum cartel) unilateral action<sup>15</sup> varies from protective measures taken against the cartel in the form of tariffs, quota arrangements, and administrative discrimination to anti-trust action and dissolution suits.

International cartels such as these are enduring and powerful. They outlast wars, changes in government, revolutions, and even the rise and fall of political states. Their empire-building flourishes (enjoys "freedom of enterprise") under conservative or reactionary regimes such as the recent extreme right-wing counterrevolutionary government of Nazi Germany. They are formed, supported, and defended by the big industrialists, the big land or property owners, the big newspapers, the big corporation lawyers, and big "planners" generally.<sup>16</sup>

However, under liberal or democratic regimes committed to promoting the common welfare, cartels are likely to be subjected to public control and repression. Thus in Germany the one attempt to put legislation on the books protecting the German people against abuses of economic power was made by the Weimar Republic in 1923. Similarly in the United States the periods of real activity and zeal to enforce antitrust legislation

<sup>14</sup> Consult Paul Lamartine Yates, *Commodity Control, a Study of Primary Products* (London, 1943).

<sup>15</sup> See Oswald Lenich, *Kartelle und Staat unter Berücksichtigung der Gesetzgebung des In- und Auslandes* (Berlin, 1938).

<sup>16</sup> Robert A. Brady, *Business as a System of Power* (New York, 1943); Friederich A. Hayek, *The Road to Serfdom* (Chicago, 1944).

have uniformly been those of liberal forward action. At other times, notably in the money-mad twenties, the law gathered dust on the statute books.

Attempts to handle international cartels in Germany, England, and the United States indicate that unilateral action may be direct or indirect. It may foster the formation and enforcement of business arrangements affecting international trade. It may limit them. It may seek to eliminate them. In all cases the economic aims of public policy can be assumed to be identical: to maximize the national dividend. But which policy of cartel control succeeds best in securing high-level consumption, production, and employment? That of using cartels? "Playing ball" with them? Handling them with kid gloves? Or repressing them?

German policy, of course, attempted to promote public welfare by making use of cartels. With its historical tradition of *Kameralism*, its late emergence as an industrial rival of Great Britain, the "blood and iron" policy of its military and Junker aristocracy, and its weak democratic institutions, Germany hailed the aggrandizement of power by its cartel operators<sup>17</sup> as evidence of increased national strength and international prestige. The Bavarian and then the German Supreme Court laid down the dictum that enforcement of cartel contracts was necessary to eliminate disastrous overproduction, safeguard higher wages, and avoid crises "detrimental not only to the individuals affected but also to the national economy as a whole."<sup>18</sup> In 1910 even the German Reichstag was brought into

<sup>17</sup> For an historical sketch see Fritz Kestner, *Der Organisationszwang; eine Untersuchung über die Kämpfe zwischen Kartellen und Aussenseitern* (Berlin, 1927).

<sup>18</sup> See *Decisions of Bavarian Supreme Court* (1888), XII, 6-7, 22; also *Decisions of the German Supreme Court*, June 25, 1890 (28 R.G.Z. 244) and Feb. 4, 1897 (38 R.G.Z. 155).

action to force elements into line desiring to secede from the potash cartel. Contracts with American consumers were canceled despite representations by the State Department.<sup>19</sup>

Compulsory cartelization spread like creeping paralysis from the potash industry to coal, and by 1932 had frozen prices to such an extent as to hold them at 93.8 percent of the 1926 level, while free prices went down to 60.8 percent.<sup>20</sup> So drastic was the reduction in production and employment in the cartelized industries that the world depression of 1932 not only was most severe in Germany but helped to produce a Hitler. Under the Nazis compulsory cartelization was completed. The monopolistic corporate state, or "New Order," came into full power. In short, unilateral action to foster cartels in Germany not only failed to achieve higher national income but ended in suppression of free private enterprise and other freedoms as well.<sup>21</sup>

Elsewhere on the continent of Europe individual countries strove to control or protect themselves against international cartels by letting in the full light of publicity. Cartel registration was tried as a device for getting such basic facts as the texts of international cartel agreements, the names of the participating firms, the products involved, the prices, sales conditions, production quotas, and market allocations agreed upon, the patent arrangements made, and so forth. Proposals for registration became law in Norway, and in Bulgaria, Czechoslovakia, Rumania, and other Southeastern European countries.

<sup>19</sup> For an authoritative account see George Ward Stocking, *The Potash Industry* (New York, 1931).

<sup>20</sup> This compilation of cartelized prices and free prices was made by the *Institut für Konjunktur Forschung*.

<sup>21</sup> The indissoluble organic connection between tolerance of restrictive cartel practices, elimination of free enterprise, and fascism is ably and concretely expounded in Wendell Berge, *Cartels: Challenge to a Free World* (Washington, 1944).

Nowhere, however, did cartel registration as tried by Germany's neighbors yield significant results.<sup>22</sup> In no case did more than a small fraction of the international cartels known to exist even bother to register. In most instances the information filed was innocuous and useless, firms being hesitant to implicate themselves or arouse adverse public comment. On the other hand, cartel registration not only gave legal recognition to the cartel, but frequently conferred, not of right but in fact, some degree of advance immunity. Cartels not only continued to grow in countries adjacent to Germany but engaged so successfully in economic warfare that cartel operators and their adherents provided practically all the collaborators Germany needed to achieve economic and military conquest.<sup>23</sup>

Great Britain has taken little direct action against international cartels, but a great deal of indirect action.<sup>24</sup> Cartel contracts there are, by-and-large, voidable and unenforceable, thus preserving freedom of action for the independent.<sup>25</sup> Until recently British tariffs were so low as automatically to protect the British economy against the extreme practices of cartels. Consumer and producer cooperatives, while not as successful as those of Sweden or Denmark in resisting monopoly in international trade, also served as a check. Furthermore, a compulsory work clause in British patent legislation, while not frequently used, has reduced the extent to which restrictive provisions are made effective in patent licensing contracts.

<sup>22</sup> This, of course, does not imply that cartel registration would be ineffective if implemented by international action.

<sup>23</sup> See Joseph Borkin and Charles A. Welsh, *Germany's Master Plan* (New York, 1943).

<sup>24</sup> Consult Hermann Levy, *Monopolies, Cartels and Trusts in British Industry* (London, 1927).

<sup>25</sup> In recent years Britain has departed from this policy in a number of industries, notably cotton textiles. See Arthur F. Lucas, *Industrial Reconstruction and the Control of Competition: the British Experiments* (New York, 1937).

In contrast with Great Britain the United States has done almost nothing to combat cartels by indirect means. Behind inordinately high tariff barriers, behind a patent system made to order for restrictive and monopolistic abuses, and behind charters of incorporation granted by states, which, like Delaware, compete in laxity, American cartel operators have had as powerful a voice in international cartel affairs as those of any other country. As a result no small part of the leadership for some of the world's most powerful international cartels has been provided by big American concerns, notably companies selling aluminum, alkali, molybdenum, electric lamps, plastics, photographic materials, electrical equipment, aircraft instruments, alcohol, antiknock compounds, aviation gasoline, flat glass, and petroleum.

Among direct controls the antitrust laws are, of course, highly important. But before discussing their applicability to international cartels let us note that the Sherman Act is no more the only form of direct control nor the only weapon against monopoly than the saw is the only implement used by a carpenter. In the railroad industry, in shipping, and in the public utility field, for example, Congress has enacted statutes such as the "Death Sentence" for holding companies or the TVA, and has established commissions with power to exercise direct social control which could be more rigorous than the antitrust laws.<sup>26</sup> To get social performance in, say, the international aviation, shipping, or communications industry, the use of regulatory boards or commissions may be necessary to implement and supplement antitrust laws in these special fields.

Furthermore, it is no violation of the principles of free com-

<sup>26</sup> This is not intended to imply that the Interstate Commerce Commission and other regulatory bodies always accomplish the public purposes which are entrusted to them.



petition for the government to enforce fair labor standards and provide metes and bounds or floors to competition to keep it from degenerating into oppression of the weak by the strong. Referees, umpires, and the rule book have the same function on the athletic field. In industries where the danger of monopoly is small and the likelihood of exploitation large, collective action to strengthen the bargaining power of farmers, consumers, and labor may be desirable. The same principles of social control dictate, on the one hand, suppression of monopolies by anti-trust legislation and, on the other, support of agricultural co-operatives and labor unions in their legitimate purposes. Except to the captious legalist, statutes which set bounds to free competition in order to effect the purposes of social control are not contradictory but complementary.

Nor should the extent to which business behavior conforms to the principles of the antitrust laws be judged solely by statistics of actions taken, the number of cases won, and so on. Obedience to the law against murder, for example, is greatest when no murders occur and the machinery of enforcement is idle. Similarly, in a good deal of the large area in which the antitrust laws are relied upon to secure social performance by business, antitrust suits have never been brought. Practically all of the business done on Main Street in thousands of American villages and towns, and a good deal of American foreign trade, is carried on by individualistic small businessmen who rarely give the Sherman Act a thought. Workable competition, to borrow a felicitous phrase from Professor J. M. Clark, is the life of their trade. Fully 98 percent of American business enterprises, by number, have to meet continual and substantial competition, intercompany, intercommodity, and interindustry.

On the other hand, small as may be the percentage of businesses that "get together," the volume of goods, particularly

manufactured materials, and the proportion of the labor force involved are large, possibly as much as half the total.<sup>27</sup>

The relative prevalence of large or small enterprise will be peculiarly subject to change in the period of reconversion. Seventy percent of the prime war contracts by value have been awarded to the one hundred largest contractors. With substantial war profits and enormous financial resources, these large concerns stand ready to buy control of new segments of American industry in exactly the same manner that a prominent powder manufacturing concern took the profits it made out of the First World War, not only to buy a number of well-established independent businesses such as Grasselli Chemical and Krebs Pigment, but also to acquire a sufficient minority interest to control one of our largest automobile manufacturing concerns.<sup>28</sup>

Reconversion and programs for the disposal of surplus plant and property also afford unusual opportunities to preserve and extend competition, particularly between commodities and between industries. Such a policy is preferable to one of concentrating upon an effort to break up big companies into little ones. It offers particular promise in the fields of light metals and plastics. The economy needs experimentation and competition between aluminum, magnesium, and copper; between natural and synthetic rubber; between various types of plastics. If technology is kept free, the extent to which intercompany competition may remain in any one industry, say copper, becomes secondary.

No reliable estimate is available of the percentage of Amer-

<sup>27</sup> For the best estimate of the extent to which monopolistic practices have permeated the American economy, see Temporary National Economic Committee, Monograph No. 21, by Clair Wilcox: *Competition and Monopoly in American Industry* (Washington, 1940).

<sup>28</sup> At the same time the government was spending its effort against the United States Steel Corporation and losing its case by a 5 to 4 decision.

ican industry now affected by international cartels. Suffice it to point out that up to January 1, 1945, some 52 international cartel cases had been initiated.<sup>29</sup> Thirteen had affected American imports such as magnesite, quebracho, newsprint, nitrate of soda, bichromates, and potash. Eleven had involved American exports such as alkali, aircraft instruments, dyestuffs, plastics, and molybdenum. In 16 instances pleas of *nolo contendere* had been accepted; 15 consent decrees had been negotiated; 12 cases were in various stages awaiting trial, and 7 had been postponed until after the war. One hundred and five commodities had been involved, of which 54 are chemicals. One hundred and sixty-five business concerns had been named, of which 36 are foreign.

In contrast to the inconsequential amount of information about international cartels produced by registration and other cartel-fostering devices, antitrust proceedings in the United States, especially since 1940, have produced a storehouse of information<sup>30</sup> concerning international cartels which is being gratefully utilized by democratic governments all over the world.

The more important antitrust laws that apply to foreign trade and commerce and hence to international cartels are, in addition to the Sherman Act, the Wilson Tariff Act of 1894 (which reiterates the prohibitions of the Sherman Act with respect to our imports), Section 11 of the Panama Canal Act (which prohibits boats owned or operated by violators of the antitrust laws from going through the Panama Canal), and the Webb-Pomerene Act.

Under the antitrust laws it makes no difference whether the

<sup>29</sup> U.S. Senate, Kilgore Committee, Report No. 4: *Cartels and National Security*, Part II, pp. 37-60.

<sup>30</sup> Consult especially U.S. Senate, Bone Committee, *Patents* (10 vols., Washington, 1942), Hearings on S. 2302, 77th Congress, 2d Sess.; U.S. Senate, Committee on Military Affairs, *Scientific and Technical Mobilization* (15 vols., Washington, 1943-44), Hearings on S. 702, 78th Congress, 2d Sess.

practices, agreements, or conspiracies constituting international cartels are initiated here or abroad. If formed abroad, whether by foreigners or our own citizens, such agreements may none the less be prosecuted or enjoined in the United States if they directly or indirectly affect our foreign commerce and are put into operation here. Even if the participants—foreigners or American citizens—act in accordance with the laws of the government under whose jurisdiction they are operating or even if they act as agents for that government, or even though that government has a substantial interest in the resultant cartel and its activities, they do not thereby obtain immunity from suit. Of course, it may be difficult in actual practice to obtain personal jurisdiction.<sup>31</sup>

Furthermore, concerted arrangements with the purpose or effect of restraining our foreign trade, when made here by our own citizens or our own corporations, are subject to the antitrust laws even though the carrying out of such restraints takes place wholly outside this country.

### *Difficulties of Unilateral Action*

Unilateral action has numerous shortcomings. In the first place, it fails adequately to protect the American consumer against cartelization of vital imports. In 1926 the high price paid for rubber (\$1.03 a pound) led to vigorous public protest against the Stevenson plan<sup>32</sup> and similar restrictive arrangements. For a time the Department of Commerce actively studied<sup>33</sup> international cartels and urged various measures of protection. A suc-

<sup>31</sup> This paragraph condenses the authoritative exposition given by Wendell Berge, *Cartels*, pp. 250–53.

<sup>32</sup> U.S. Bureau of Foreign and Domestic Commerce, Trade Information Bulletin No. 385: *Foreign Combinations to Control Prices of Raw Materials* (Washington, 1926). This summarizes American experience not only with rubber, but also with coffee, fibers such as sisal, and certain chemicals.

<sup>33</sup> See, for example, U.S. Bureau of Foreign and Domestic Commerce, Trade Promotion Series No. 81: *Representative International Cartels, Combines and Trusts*, by William F. Notz (Washington, 1929).

cessful suit was brought under the provisions of the Sherman Act and the Wilson Tariff Act against the sisal cartel.<sup>34</sup> But with the utter collapse of the prices of international goods from 1927 to 1932, all agitation died down.

As a general rule, the more irreplaceable the import (for example industrial diamonds, cocoa, quinine, tin, or nickel) the more helpless the American consumer and the less effective is unilateral action. Several recent cases brought by the Department of Justice have demonstrated, however, that the spotlight of publicity, even when focused on an industry entirely foreign owned and situated, has decidedly beneficial effects.<sup>35</sup> Prices are kept down and operations conducted more nearly as in a goldfish bowl. The cases of quebracho, magnesite, newsprint, and Chilean nitrate are outstanding examples.

In the second place, unilateral action may afford inadequate support to American exporters. By and large, American exports have been (and will be) so urgently required throughout the world as to cause foreign demand for dollar exchange to be acute.<sup>36</sup> American exports do not need to be pushed.

But there may be, and indubitably have been, occasional instances when by private boycott or governmental action American exporters are compelled to accept the quotas assigned by the cartel or be closed out of the market entirely.<sup>37</sup> The economic

<sup>34</sup> United States vs. Sisal Sales Corporation, 274 U.S. 268 (1927). This was a case in which the conspiracy related to acts performed abroad, but was formed by parties within the United States and made effective by acts done here.

<sup>35</sup> See Wendell Berge, *Cartels*, especially Chapter VIII and pp. 240-45.

<sup>36</sup> For demonstration of this point see National Planning Association (Planning Pamphlets Nos. 37-38: *America's New Opportunities in World Trade*, Washington, 1945), pp. 2-4, 10-12, 18, 31-34, 45-48.

<sup>37</sup> For a comprehensive study of the movement toward exchange controls, export marketing schemes, and monopolies in the thirties see Margaret S. Gordon, *Barriers to World Trade, a Study of Recent Commercial Policy* (New York, 1941).

warfare of the thirties sometimes left small nations little other recourse. Cartels breed cartels.

Twenty-five years ago, as now, there was considerable agitation in the United States and Great Britain against German cartels, coupled with a concerted drive for legislation permitting exporters to combine operations in export markets in order to be able to compete<sup>38</sup> with the gigantic foreign cartel. In the United States the Webb-Pomerene Act was passed; in Great Britain the argument was exploited by Lord Melchett and others to win governmental connivance at the formation of a virtually complete monopoly in dyestuffs and other chemical industries.

At the present time the same hue and cry is being raised. "American business even at its strongest," writes an eminent business executive in a recent article, "is relatively helpless against the competition of well-organized foreign businesses supported by the power of their governments. . . . The pressure of circumstances will tend to make us accept cartels because other nations accept them."<sup>39</sup>

The remedies proposed are likewise by no means new, although there are some new wrinkles. Again one finds the suggestion that proposed cartel agreements be registered—current agitation favors the State Department as custodian. Again there is advanced one or another variant of the proposal for revokable clearance and advance immunity, with a section or board in the State Department being preferred as the agency to approve or disapprove the foreign trade cartel agreements so registered.<sup>40</sup>

<sup>38</sup> A concise, authoritative account of the origin, purpose and scope of the Webb-Pomerene law is given by Wendell Berge, *Cartels*, Chapter XII.

<sup>39</sup> Milo Perkins, "What Are Cartels and Whall Shall We Do about Them," *Reader's Digest*, March, 1945, pp. 23-24 (originally published in *Harper's*, Nov., 1944). Italics in original.

<sup>40</sup> See, for example, *Memorandum on Regulatory Measures Affecting American Foreign Trade*, a document submitted to and published by a subcommittee of the National Foreign Trade Council (New York, 1944).

Again one finds no attempt to present even a shred of evidence that the total amount of American foreign trade will be expanded by as much as a single dollar.

Obviously, proposals such as these, based upon an assumption that post-war foreign markets will be cartelized, ignore certain stubborn facts. As has already been mentioned, not more than a third of world trade is under cartel "control," and easily less than 10 percent is dominated by well-organized foreign businesses supported by the power of their governments.<sup>41</sup> The underground in Europe and in democracies elsewhere are establishing, not right-wing governments willing to be implements of big business, but left-wing governments that will not be particularly tender toward international cartels that collaborated energetically with the enemy.<sup>42</sup>

But if cartels should persist abroad, the suggestion that American concerns be allowed to join them is unwise. Unilateral effort to deal with the problem of international cartels by granting immunity usually results in signing a blank check for monopoly both at home and abroad. "Monopolistic practices in export trade necessarily spread into the domestic market."<sup>43</sup>

<sup>41</sup> *Supra*, pp. 73-76. These figures apply to the period of cartelism and fascism in its heyday. The percentage after the war will be less.

<sup>42</sup> Especially vigorous opposition to cartels has been expressed not only in the literature of the underground but in the Russian Army newspaper *Red Star* and in a famous speech by de Gaulle. Not a single government among the United Nations has come out officially in favor of cartels. The main and almost the only avowed supporters of cartels are, in addition to the governments of Nazi Germany, Fascist Italy, Franco Spain, Japan, and Argentina, certain big business groups in Holland, Switzerland, Sweden, Great Britain, and the United States. See Wendell Berge, *Cartels*, p. 235.

<sup>43</sup> Corwin D. Edwards and Redvers Opie, "International Cartels and Private Trade Agreements," in *America's Place in the World Economy* (Institute on Postwar Reconstruction, New York University, Series IV, No. 5, Nov. 15, 1944), p. 118. "There is no reason to suppose," says Professor Edwards, "that members of industry acting together to fix foreign prices and to determine the size of exports will fail to consider the effect of export policies upon domestic sales . . . nor protect the home markets of other cartel members without exacting a recip-

There remain none the less certain unavoidable hardships for the independent exporter. In a few instances cartels have used against him local price cutting, full line forcing, distributor boycotts, and similar devices. Sometimes agreements enjoined here are valid and enforceable abroad, say in Argentina. Cartels operating in the independent exporter's foreign markets often induce foreign governments in subtle ways to throw difficulties in his path. In short, unilateral action is sometimes unable to give adequate protection to the American exporter.

In the third place, cartels are alleged to be necessary in order to protect American business against bulk buying or state trading.<sup>44</sup> Unilateral action designed to repress cartels is therefore regarded as obsolete and ineffective.

It is conceivable, of course, that American exporters in selling abroad might be adversely affected by a state buying monopoly such as the Amtorg Corporation. Prior to 1939, however, state buying affected but a small part of world demand, and so far as one can foresee this is also likely to be true in the post-war period. The United States is by far the largest importer and exporter. Great Britain has indicated that it will return for the most part to private trading.

As a seller, some state somewhere may monopolize the sale of an item which has no good substitutes and cannot be secured elsewhere. But with the possible exceptions of helium, sulphur, and molybdenum in the United States, an instance of such a

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local protection of their position in their own home markets." Reprinted by permission of the Institute on Postwar Reconstruction, New York University.

<sup>44</sup> Sometimes state trading and bulk buying are spoken of as if they presented the problem of cartels in a different form. But a state buying monopoly, say for Holland, Belgium, Norway, or even France, becomes merely one, and probably not the largest, of several bidders in the international market and will have an interest in keeping prices down rather than monopolistically high. A state selling monopoly for most countries and in practically all industries would have less to sell than a single large American concern, competition with which would similarly inhibit the efficacy of restrictive selling practices.



possibility is hard to find. Imaginations sometimes conjure up a combination of states which might discriminate against or mulct American importers or concertedly sell in the American market without due regard to costs or profits, or might have political rather than business objectives. If such cases should arise, the remedy is government action and diplomacy, preferably multi-lateral, rather than countermonopolies.

In the fourth place, since unilateral action can affect only one segment of an international cartel, the necessity of acting unilaterally may render an individual government less able and willing to enforce its own policies against a cartel member subject to its jurisdiction. Except by a stroke of luck no one country can get at more than a fraction of the facts concerning an international cartel. The managers of cartels can shift the head office and records to the country (frequently Switzerland, the Netherlands, or Panama) most lax in its controls, as American domestic corporations get charters in Delaware. By bearer shares, multiple voting shares, controlling trusteeships, and other devices, the locus of power can be moved whenever a particular nation exhibits a desire to investigate. Moreover, a state is embarrassed in taking action solely against domestic concerns which are participants in a cartel because thereby these concerns may be weakened without a corresponding reduction in the monopolistic strength of foreign concerns which are likely to be represented as the really active and culpable members of the cartel.

In the fifth place, unilateral action does not help American firms to get the technical knowledge necessary to work patents or inventions made in other countries, especially when the foreign concerns are unwilling to license their patents except to those participating in the cartel. The manner in which nonparticipants in a cartel are excluded by participants is illustrated by an episode in the synthetic rubber industry:

When corporations outside the I.G.-Standard Oil orbit attempted to manufacture buna rubber, they were confronted with the combined strength, wealth and power of the private coalition. Goodrich and Goodyear attempted such production, but the former was sued for patent infringement and the latter formally threatened with suit by the Standard Oil Company under the I.G. patents. This took place in October 1941, a few weeks before Pearl Harbor.<sup>45</sup>

Finally, the fact should be emphasized that unilateral action still leaves the individual government subject to the pressure and influence of international economic power groups, sometimes superior to it in strength, information, and bargaining ability. International cartels have been known to play governments off against each other in much the same way that domestic corporations have played state legislatures, thereby securing special privileges or preventing the enactment of "unfavorable" legislation. Numerous changes in tariffs, commercial treaties, and other governmental measures have been manipulated, dictated, or devised by international cartels.

### *Possibilities of Unilateral Action in the United States*

In the face of these difficulties let no one think, however, that the United States is helpless, or that we must have cartels whether we like them or not, or even that the rest of the world or any large part of world trade will inevitably be cartelized irrespective of our own action. It requires only one vigorous competitor to break a cartel, many more than that to make or maintain one.

The United States has an unparalleled opportunity to take indirect action against cartels. It is largely in that way that the American antitrust laws can be substantially buttressed. No small part of the weaknesses of the Sherman Act is due to lack

<sup>45</sup> Berge, *Cartels*, pp. 212 *et. seq.*

of proper implementation and appropriate supplementation. In the words of Assistant Attorney General Wendell Berge:

In particular, our policies with regard to patents, trade-marks, the tariff, monetary and credit matters, interstate commerce and foreign trade, all have a direct bearing upon competition and the pattern of industrial organization. They are important factors conditioning the efficacy of a free market for performing its basic economic functions. To our comparative neglect of the incidence of these policies on the problem of maintaining healthful competitive conditions in industry must be attributed a large share of the responsibility for the difference between antitrust goal and business practice.<sup>46</sup>

Most effective of all would be the lowering of our tariff barriers.

Furthermore, it lies wholly within our own power so to reform our patent laws that abuses will be eliminated. Even so mild a reform as remedial compulsory licensing would considerably mitigate cartel power for public injury.<sup>47</sup> A measure providing for effective mobilization of industrial and scientific research would equip American industry with a technical knowledge second to none. Illustrative of sincere attempts in this direction is the Kilgore bill,<sup>48</sup> which would mobilize technology for industry, especially small business, in much the same way that the results of agricultural research at various experiment stations and elsewhere are made freely available to farmers.

Direct action by the United States is also a highly effective method of preventing and emasculating restrictive practices internationally. With vigorous competition from American pro-

<sup>46</sup> Berge, *Cartels*, p. 2.

<sup>47</sup> For a brief but excellent discussion see Jerry Voorhis, "Preventing Monopolistic Abuse of Patents," *Congressional Record*, Dec. 18, 1943, pp. 11025-27. His bill, H.R. 1371, is earnestly recommended.

<sup>48</sup> Senate Bill No. 702, 78th Congress, 1st Sess. Consult also the classic monograph on this subject by Walton H. Hamilton, *Patents and Free Enterprise* (T.N.E.C. Monograph No. 31, Washington, 1941). See also Wendell Berge, *Cartels*, Chapters III and IV.

ducers international cartels will not find it easy to freeze prices, allocate markets, or fix output. If, in addition, a realistic, hard peace is made with Germany which eliminates not only the military but the industrial capacity to make war upon us, international cartels in most industries will be substantially weakened.

Finally, the fact should not be forgotten that the peoples of the United Nations have fought a costly war against cartelism, fascism, and other forms of economic and political regimentation. They are looking ahead eagerly to a free world as outlined in the Atlantic Charter. Unilateral action by the United States, though effective, can be made more so if it is reinforced by multilateral coordination of effort and policy.

# THE POSSIBILITIES OF AN INTERNATIONAL POLICY TOWARD CARTELS

By CORWIN D. EDWARDS <sup>1</sup>

SUGGESTIONS that governments develop a joint policy toward the activities of international cartels have become common during the present war. Popular interest in the subject, both here and abroad, is derived largely from the disclosures about cartel practices which have been made in this country by Senate investigating committees and by the prosecuting staff of the Department of Justice. But governments of the United Nations have also encountered cartels while trying to find and seize enemy property, to boycott enemy trade, and to censor communications with the enemy; for in many cases cartels have been used in efforts to frustrate such policies. Though wartime experience with cartels might in itself have suggested the need for action against them, it has been reinforced by a belief that cartel restrictions are inconsistent with programs to raise standards of living and reduce trade barriers throughout the world by international measures incorporated in the peace settlement. Governments which intend to reduce governmental trade barriers are likely to acquire a predisposition to curb private restrictions upon trade as well, and governments which are pursuing full

<sup>1</sup> Professor of Economics, Northwestern University. Formerly, consultant on cartels, Department of State, and chairman, Policy Board, Antitrust Division, Department of Justice. Author of *Economic and Political Aspects of International Cartels* (Washington, 1944), Monograph No. 1, U.S. Senate, Committee on Military Affairs, Subcommittee on War Mobilization.

employment cannot look complacently upon private programs for the organized limitation of output.

In appraising the possibilities of joint action by the United Nations to curb the restrictive activities of international cartels, I shall confine myself to the type of program which might be appropriate as a permanent part of international economic arrangements. I shall not discuss the special cartel problems which arise in connection with the military occupation of enemy countries and with the more enduring plans to safeguard the rest of the world against aggression and to encourage the development of democratic tendencies within enemy territory. These subjects are discussed elsewhere in this volume. I shall also omit all but a very brief discussion of those industries which, by general consent, create special problems and require special treatment outside the confines of ordinary commercial policy.

The first question raised by proposals that governments act jointly about cartels is whether the problem cannot be dealt with satisfactorily by the individual countries, each pursuing its own policy. In the United States the opportunity for separate national action is particularly good because our antitrust laws can be applied to most of the cartel activities which arouse our concern. However, as Mr. Kreps has pointed out, certain limitations are inherent in action by a single country. Foreign cartels which control our imports cannot be broken up by our law. Even though from time to time an antitrust case directed against such an arrangement may result in a formal legal victory, its effect is merely to make the cartel more careful to keep its members and its activities beyond the jurisdiction of the American courts. Moreover, our exporters who sell in cartelized markets are handicapped in their effort to operate independently wherever a foreign government is willing to support a cartel by erecting discriminatory trade barriers against independent concerns and

wherever the cartel itself enjoys such control over distributive channels as to be able to develop an effective boycott. Such discriminations are relatively rare, and the more usual consequence of cartel activity is to help the independent by limiting the sales and raising the prices of his cartelized competitors. Nevertheless, there are instances in which an anticartel policy, independently pursued, creates some difficulty in export trade.

Apart from these limitations of scope, American experience indicates that unilateral action against cartels may suffer from deficiencies of information and difficulties of procedure. Cartel contracts are often made and cartel records kept outside this country, at some spot where the political environment is less hostile; and in consequence, though American jurisdiction may be clear, our government may have trouble proving what has been done. In some cases American concerns are linked with cartels through contracts made by their foreign subsidiaries and affiliates or by foreign enterprises which are controlled by the same stockholders. In such cases there is an effort to deny the jurisdiction of the American courts or the reality of the connection between the cartel and the domestic enterprise.<sup>2</sup> Moreover, in countries in which cartel contracts are legal, the effectiveness of an international cartel may be enhanced through the enforcement of cartel obligations upon all the participating concerns, American concerns included; and even when the performance of a cartel contract has been enjoined by an American court, the possibility still remains that the courts of other countries may continue to regard the contract as valid and to enforce it or award penalties for its breach.

<sup>2</sup> A case in point is the arrangement by which Aluminium, Ltd., of Canada participated in an international aluminum cartel while the Aluminum Company of America, controlled by the same stockholders, took no formal part therein. Members of the cartel respected the American company's right to the United States market, but a special appellate court found in March, 1945, that the government had not proved the Aluminum Company's membership in the cartel.

Though joint governmental action against international cartels would be desirable as a remedy for such weaknesses, there are other and broader grounds for developing an international policy. Recent experience has demonstrated that the United States cannot look complacently upon economic stagnation, autarchic and restrictive policies, or programs of aggression in any important segment of the world. We have become convinced that prosperity must be international if it is to be secure in any nation; that widespread unemployment and distress are the economic seedbeds of totalitarian and aggressive movements; and that the erection of a network of barriers to international trade is a long step along the road to war. Our interest in our own peace and prosperity gives us a stake in such developments everywhere. In so far as cartels point toward organized scarcity, unemployment, the erection of private trade barriers, and the fostering of an economic environment appropriate to political disturbances of the peace, we have an interest in suppressing them, whether or not our own trade is directly affected. Of course we cannot attempt to coerce the policies of other nations in trading among themselves, but we can encourage the development of policies of full production and liberal trade throughout the world and cooperate to this end with other countries of like mind.

A program for international action against cartels is now a settled part of the post-war economic policy of the United States. This policy was officially announced by President Roosevelt in September, 1944, in a public letter to the Secretary of State. He wrote: "More than the elimination of the political activities of German cartels will be required. Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed. With international trade involved this end can be achieved only through collaborative action by the United Nations." The Secretary replied in effect that his department



had been preparing such a program for about a year. More recently joint action against cartel restrictions was proposed as one of ten economic principles by the American delegates at the Inter-American Conference at Mexico City.

### *Is There a Basis for Joint Action?*

Without denying that international action against cartels is desirable, some who have written on this subject in recent months,<sup>3</sup> have proposed a program of wistful renunciation. They contend that the United States stands alone in its opposition to restrictive private programs of the cartel type and that we must learn to live with other countries which favor, or at least do not oppose, such programs. They deny that there is any political basis for an international policy against cartels.

This view is based upon a misreading of history. Before the present war there was no unanimity in the attitude of governments toward cartels, either national or international. In general, governmental policies fell into three groups. The first was hostile to monopolistic activities and private trade restrictions and sought to prevent such developments by law. Although the American antitrust laws are the oldest and in some respects the strongest expressions of such a policy, similar statutes were to be found in some of the British dominions, notably Canada,<sup>4</sup> and in certain Latin American countries, notably Brazil,<sup>5</sup> Argentina,<sup>6</sup>

<sup>3</sup> See, for example, Milo Perkins, "What Are Cartels and What Shall We Do about Them?" *Reader's Digest*, March, 1945, p. 23 (originally published in *Harper's*, Nov., 1944); National Foreign Trade Council, *Memorandum on Regulatory Measures Affecting American Foreign Trade* (New York, 1944).

<sup>4</sup> See Lloyd G. Reynolds, *The Control of Competition in Canada* (Cambridge, Mass., 1940).

<sup>5</sup> Decree Law No. 869 of Nov. 18, 1938. See Nelson Hungria, *Dos Crimes Contra a Economia Popular* (Rio de Janeiro, 1939); and Temporary National Economic Committee, Monograph No. 40: *Regulation of Economic Activities in Foreign Countries*, pp. 130-31.

<sup>6</sup> Law No. 11,210 of Aug. 24, 1923. See *Laws of Argentina*, comp. and trans. by J. A. and E. DeMarval (Buenos Aires, 1933), p. 899.

and Mexico.<sup>7</sup> In some of these countries the legislation was relatively recent and had not been extensively enforced; but before discounting it for this reason, an observer should remember the weakness and lack of enforcement which characterized our own antitrust laws for many years after their enactment.

A second group of states had undertaken neither to prevent nor to foster restrictive arrangements. Representative of this group is the United Kingdom. Here businessmen were free to agree among themselves to restrain trade, and during the thirties the government had encouraged some such agreements. However, there were substantial legal limitations upon the power of business enterprises to coerce reluctant third parties to participate in the restrictions.<sup>8</sup>

A third group of states had legalized cartels. Within this group, however, there were three subgroups with widely differing attitudes toward the cartel problem. In one of these, typified by France,<sup>9</sup> court decisions had established the legality of restrictive cartel arrangements in spite of an earlier statutory prohibition of such schemes, but the cartel system had never been legislatively endorsed. In the second subgroup, cartels had been legally recognized in statutes which attempted to check their activities and to prevent their abuses. In Norway,<sup>10</sup> for example, a cartel law sought to arm agencies of the government with broad powers to protect the consuming public against extortionate or discriminatory practices. In various countries of Eastern Europe, notably Hungary,<sup>11</sup> statutes requiring the registra-

<sup>7</sup> See T.N.E.C. Monograph No. 40, pp. 152-54.

<sup>8</sup> In the United Kingdom, as in the other countries mentioned, including the United States, particular industries had been subjected to special restrictions upon competition, under legal sanction and surveillance. Such exceptional cases are not regarded as indicative of the broad character of national policy.

<sup>9</sup> See T.N.E.C., Monograph No. 40: *Regulation of Economic Activities in Foreign Countries*, pp. 87 ff.

<sup>10</sup> See Norwegian Trust Law of March 12, 1926.

<sup>11</sup> See National Foreign Trade Council, *Memorandum on Regulatory Measures*, pp. 112-15.

tion of cartel contracts had been enacted in the hope that publicity would be a corrective of abuses by concerns most of which were located outside the borders of the countries undertaking such legislation. Even Germany, the historic home of the cartel, was for a time an exponent of this policy; for the German cartel law of 1923, which first gave statutory recognition to the cartel type of organization, expressed the program of German liberals who were convinced that it was too late to destroy cartels and that, therefore, the proper policy was to regulate them. At the outbreak of the present war, the third subgroup included at most only seven or eight countries. In these states cartels had been so far accepted that statutes encouraged them and even provided that business enterprises might be forced to join them. The countries with such a policy were Japan, Italy, Germany, Belgium, Czechoslovakia, Switzerland, South Africa, and Holland.<sup>12</sup>

In the light of this history it is not correct to say that before the present war governments other than the United States had generally embraced the cartel pattern. Of those which had done so, three were totalitarian governments which subsequently became our enemies. Among other nations there was in some cases indifference, in some cases alarm expressed in attempts at regulation, and in some cases dislike expressed in attempts at prevention. There was no unanimity of policy.

The development of policy among the United Nations during the present war has pointed toward rejection rather than acceptance of the cartel pattern. The broad principles upon which the post-war settlement is to be based have been announced in two documents, the Atlantic Charter and Article VII of the Master

<sup>12</sup> *Ibid.*, pp. 112-22. It is noteworthy that the Swiss law seems to conflict with the Swiss constitution and affords an ambiguous basis for compulsory cartelization; that in Holland the power to compel cartel membership is vested in the government only in cases in which the cartel has attained outstanding importance; and that in South Africa the agencies in which membership may be compelled are quasi-public in nature.

Lend-Lease Agreement. The Atlantic Charter is concerned primarily with political arrangements and in its references to economic affairs is explicit only as to an intent to avoid discrimination in access to raw materials. The Master Lend-Lease Agreement, however, is directly in point. It is a contract between the United States and countries with which we exchange commodities under lend-lease. The economic policy set forth in the contract is announced as a consideration for the aid which is to be extended. Thus the terms of this policy constitute a formal international bargain which has been given effect not only by the signatures of governments but by exchange of billions of dollars worth of war materials. The relevant portion of the Master Lend-Lease Agreement is as follows:

In the final determination of the benefits to be provided to the United States of America by the Government of the United Kingdom in return for aid furnished . . . the terms and conditions thereof shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of world-wide economic relations. To that end, they shall include provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers.<sup>18</sup>

In committing the United Nations to programs of expanding production and trade and reducing trade barriers, the Master Lend-Lease Agreement makes no specific reference to private cartels. It is reasonable to suppose that the signatory countries

<sup>18</sup> Article VII of the Mutual Aid Agreement of Feb. 3, 1942, between the United States and the United Kingdom. This agreement became the model for agreements with other countries.

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had primarily in mind governmental trade barriers, such as tariffs and quota systems. The logic of the policy announced by them implies an unwillingness to see public measures for the promotion of trade thwarted by private measures for its restriction.

Wartime developments in various countries reinforce the possibility that the agreement will be so interpreted. To varying degrees the suppression of restrictive international cartel activities has become a policy or a political issue.

In the United Kingdom concern over the activities of international cartels has been growing throughout the war. Questions in Parliament have ordinarily followed each American indictment which named British enterprises as participants in a cartel. A campaign against cartel abuses has been conducted by a section of the press, including not only a great London newspaper but also that influential journal *The Economist*. Responding to manifestations of public interest, the government undertook a study of the problem, which resulted in 1944 in a formal statement incorporated in the White Paper on Employment Policy.

An undue increase in prices due to causes other than increased wages might similarly frustrate action taken by the Government to maintain employment. If, for example, the manufacturers in a particular industry were in a ring for the purpose of raising prices, additional money made available by Government action for the purpose of maintaining employment might simply be absorbed in increased profit margins and no increase in employment would result. . . .

Workers must examine their trade practices and customs to ensure that they do not constitute a serious impediment to an expansionist economy and so defeat the object of a full employment programme.

Employers, too, must seek in larger output rather than higher prices the reward of enterprise and good management. There has in recent years been a growing tendency towards combines and towards agreements, both national and international, by which manufacturers have sought to control prices and output, to divide

markets and to fix conditions of sale. Such agreements or combines do not necessarily operate against the public interest; but the power to do so is there. The Government will therefore seek power to inform themselves of the extent and effect of restrictive agreements, and of the activities of combines; and to take appropriate action to check practices which may bring advantages to sectional producing interests but work to the detriment of the country as a whole.<sup>14</sup>

Obviously, this carefully considered statement leaves unanswered many questions about the scope and method of British government policy. However, it makes clear that the United Kingdom intends neither to remain indifferent to the cartel problem nor to foster cartel restrictions. The Minister of Reconstruction later supplemented this document by declaring that the Cabinet are agreed on the danger of restrictive trade practices of all kinds but find difficulty in deciding upon the best means to prevent them and correct them. He indicated that legislation is being prepared, and mentioned the possibility that a court of some sort might be set up to investigate restrictive practices.<sup>15</sup>

In various other countries, policy has not developed so far but points in the same direction. The Canadian government has appointed a committee to determine whether the Canadian Combines Investigation Act, which of all foreign statutes most resembles our own antitrust laws in spirit, is adequate to cope with the problem of international cartels. This committee has not yet reported. Speaking before the Canadian Institute on Public Affairs in August, 1944, Vincent Bladen, consultant to the committee, expressed his opinion as a private individual that some cartel practices are relatively harmless but that others should be pre-

<sup>14</sup> *Employment Policy* (London and New York, Macmillan, 1944), p. 19. Reprinted by permission of the publishers.

<sup>15</sup> Speech by Lord Woolton in the House of Lords, March 21, 1945. How far policy has been changed by the advent of the new Labor government is not yet clear; but Herbert Morrison, now Lord President of the Council, has been a vigorous opponent of cartels.

vented by governmental action and even by international agreement.<sup>16</sup>

The French attitude can be inferred only from official speeches. According to newspaper reports, General de Gaulle has declared that the grip of cartels upon the French economy must be broken, and in the opening speech at the first meeting of the French Consultative Assembly a denunciation of cartels was greeted with applause.

In February, 1945, Anders Oerne, Postmaster General and former Communications Minister of Sweden, published an article in which he compared the cartel system to the use of shipping convoys in wartime, because in both the pace is set by the slowest member. He said that by their very nature cartels preserve the lives of inferior enterprises by limiting and rationing production and keeping prices high enough to support such concerns. He concluded that maintenance of such a system after the war would be idiocy.<sup>17</sup> A similar view was expressed in October, 1944, by the Russian army newspaper *Red Star*, which asserted that after the war the international cartel system must be smashed.

Except in the case of Great Britain, these various statements fall far short of proof that the countries from which they come have settled upon a policy of curbing cartel activities. They do show, however, that the concern about cartels is widespread and that there is no reason for Americans opposed to the international cartel system to doubt that they will find sympathizers in the British Empire and in Europe.

Latin-American nations have already declared their support for an international attack upon cartels. One portion of the resolutions adopted by the Inter-American Conference on Problems

<sup>16</sup> Vincent W. Bladen, "International Cartel Policy," in *Canada and the World Tomorrow*, edited by Violet Anderson (Toronto, 1944), pp. 67-71.

<sup>17</sup> *Handelstidning*, Feb. 6, 1945.

of War and Peace, held in Mexico City early in 1945, is a declaration of guiding principles, set forth as a part of an economic charter for the Americas. The fourth principle reads as follows:

To seek early agreed action by governments to prevent those practices by cartels or through other private business arrangements which obstruct international trade, stifle competition, and interfere with the maximum efficiency of production and fair competitive prices to consumers.<sup>18</sup>

In this statement most of the nations of the Western Hemisphere have agreed to support joint action against cartels.

### *The Difficulties of Joint International Action*

Assuming, therefore, that an intergovernmental program to act against cartel restrictions is both possible and probable, let us examine the nature of the task. The difficulties which it entails are formidable. The formulation of a common policy must overcome obstacles of interest, tradition, and technical complexity.

The conflicts of national interest which are likely to arise in the negotiation of a cartel policy spring from the different economic positions of various countries. Prominent among these is the contrast between countries which are likely to be in a strong trading position after the war and those which expect to find difficulty in exporting enough to pay for their imports. A crude formulation of such a difference might run as follows:

The United States will be the world's principal creditor after the war. It probably will be able to lend enough to maintain its exports, and to export more than enough to pay for its imports. In unhampered competition it can be expected at least to hold its own in foreign trade. Consequently, it can afford an international competitive policy and does not need to seek support from car-

<sup>18</sup> Final Act of the Inter-American Conference on Problems of War and Peace, Mexico City, February-March, 1945 (Washington, 1945), p. 95.



tels. Great Britain, on the other hand, has sacrificed its foreign investments to buy war goods, has lost much of its shipping, and will need to export 50 percent more than before the war if it is to maintain its pre-war standard of living. It cannot easily attain such an increase of exports by a policy of free competition.

Two years ago such comparisons were often used in business circles to support the conclusion that cartel arrangements to preserve British export trade would necessarily be part of British post-war policy. Apart from possible inaccuracies in the statement of the facts, the weakness of the argument lay, not in recognition of the differences of interest between countries with expanding and contracting trade, but in uncritical acceptance of the idea that cartel restrictions might help the latter group of countries. No international cartel is willing to assign to the traders of one country a share of the world market appreciably larger than those traders might be able to command in competition; and consequently the most which the international cartel system might do for a country which is losing its exports would be to reduce the speed of its decline. Presumably, the policy set forth in the British White Paper reflects an awareness of this fact. However, it cannot be denied that countries with different export possibilities may have different views about programs for the organization of export monopolies or for the use of trade restrictions to prevent the rise of new competitors in markets which they formerly served. To this extent it may be difficult to reconcile the interests of countries which anticipate larger export markets after the war with those of others which expect smaller export markets.

Another vexing divergence of interest is likely to develop between countries which enjoy a varied foreign trade and those which are primarily dependent upon one or two export commodities. Countries of the latter type have not only a special incen-

tive to exclude competitors from existing export markets for their national products, but also a peculiarly large stake in improvement of the terms of trade for those commodities by programs of international price-fixing. If international trade policy should be discussed one commodity at a time, such countries might be expected to stand firmly for restrictive policies. The hope that they may be included in a movement against cartels rests upon the fact that a program directed against cartels would be general in scope and thus would be designed to remove restrictions upon their imports as well as their exports. Improvement of their terms of trade by lower prices upon imported goods and improvement of opportunities to diversify their national economies by removal of restrictions which have kept their citizens out of other cartelized industries—these are the aspects of an anticartel policy which may induce such countries to consider acquiescing in the loss of a sheltered export position.

Differences of tradition as to the proper relation between government and business are also likely to produce difficulties. Americans still take for granted the desirability of a predominant role for competitive private enterprise. In large parts of Europe, competition has come to be regarded as wasteful and as inconsistent with economic stability. Even in countries such as England and France this view entails a willingness to assign to the state important functions in planning the organization of the economy and in providing the incentives and safeguards for which Americans look to competition. Russian foreign trade has become a state monopoly, and in Russian domestic trade the role of the private trader has become vestigial. These different points of view may each include a dislike for restriction of output and for high prices designed to benefit a private monopolistic group, but ideas of a suitable remedy may range from free competition on the one side to state ownership and operation on the other.

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Even among governments which have a similar tradition as to the place of private business in the commonwealth, there are traditional differences as to means of governmental action. The United States is exceptional in its willingness to use prosecutions as the instrument for formulating and enforcing a trade policy. By contrast to the legalism of our approach to such questions, the United Kingdom is accustomed to work out controls over business by informal administrative understandings between businessmen and government officials.

There are also substantial differences from country to country in constitutional limitations upon governmental action, in the division of powers between central and regional governments, in the protection which the fundamental law gives to private traders, and in the rules of administrative and judicial procedure. All such differences are obstacles in developing a program of joint action, because what is permissible and appropriate in one country is likely to be unusual and even illegal in another. One or two illustrations may clarify the problem. The scope of the central government's authority over business activities in Canada is appreciably less as compared with the authority of the provincial governments than that of the United States government as compared with the authority of our states. Some activities which in this country would be under federal control as a part of interstate commerce are under provincial rather than national control in Canada. In Brazil the national government exercises an authority which is still greater, and the state governments an authority which is appreciably less, than in the United States. Moreover, the United States must observe rules of legislative, administrative, and judicial procedure which are in accord with the due process clauses of the federal constitution, whereas the Brazilian government is not similarly restricted. The acts of the American Congress are subject to judicial review for constitu-

tionality, but the acts of the British Parliament do not run such a gauntlet.

Such variations of interest, tradition, and governmental structure would be troublesome even if the cartel problem could be regarded as strictly confined to the foreign trade of the nations of the world. Unfortunately, however, it is hard to draw the line between international and domestic trading arrangements, and in consequence all difficulties are enhanced by the fact that international cartel policy will necessarily have a domestic impact. An international cartel regulates not only export and import trade but also the rights of enterprises in each country to establish subsidiary operations abroad within the territories assigned to enterprises of other countries. Thus entry into domestic manufacture and sale becomes subject to the international cartel. Similarly, many cartels provide for the assignment or license of patents in each country to certain favored enterprises, and thus an international cartel may determine which domestic or foreign concern is to enjoy exclusive producing rights under patents within any country and which concerns, domestic as well as foreign, are to be forbidden to produce under these patents. Furthermore, there is no clear distinction between an international cartel and a national organization of exporting enterprises. Since some of the members of an international cartel are likely to be great corporate combinations with subsidiaries organized under the laws of various countries, it would be easy for most international cartels to masquerade, if necessary, as national export associations. For example, the United States subsidiaries of British, French, and German enterprises might agree with American domestic enterprises upon a common program for export from the United States to Latin America. It would then be extremely improbable that the parent concerns in Britain, France, and Germany, or the foreign subsidiaries of American concerns, would

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upset this arrangement by pursuing sales policies inconsistent with it in Latin American markets.

But if the national export association is closely related to the international cartel, it is also intimately connected with domestic trade. Combinations for export and combinations for sale in home markets are likely to consist of the same concerns, and there is likely to be a close connection between price and production policies for domestic and for export sale.

In view of the supplementary character of national and international trading combinations, the boundaries of a policy directed at international cartels will not be easy to define. Tolerance of monopolistic combinations in domestic trade fosters the concentrated national groups which make international cartelization easy, and also facilitates various forms of evasion of public policy toward international cartels. Yet a joint effort by governments to curb domestic as well as international cartels would entail control over the internal policies of participating states and thus would place an impossible burden upon an international anticartel policy.

This hasty summary of problems and difficulties is obviously incomplete. Many of the obstacles to international agreement will appear only in the process of negotiating an agreement and making it effective. Similar problems are likely to arise in connection with any political or economic programs which have a scope beyond that of a single government.

### *The Nature of a Joint International Policy*

No detailed proposal for an international cartel policy has yet been made public by any government. Nevertheless, certain broad characteristics of a feasible policy must be apparent from the foregoing summary of difficulties. It is obvious that the possibility of joint action depends upon the discovery of common

ground among the different traditions and interests and upon the development of a technique which will leave each country free in large measure to act through its own peculiar legislative and administrative procedures.

The mere statement of this requirement rules out some methods of attack upon the problem. Obviously, there cannot be an international regulatory agency which would supervise and periodically approve or disapprove the activities of international cartels. An indispensable foundation for any such agency would be full agreement as to both the industrial philosophy which should underlie regulation and the procedure by which regulation should take effect.

It is equally obvious that there cannot be an international antitrust law like our own, administered by an international agency of enforcement. Few countries would be willing to delegate to an international authority the power to investigate the intimate business affairs of their citizens or to impose punishment upon them. Moreover, many countries would not condemn activities which we find objectionable and many would cavil at the use of the law courts as the instrument with which to give effect to an economic policy.

A substantial measure of agreement may be possible, however, in spite of diversities of national policy. Some cartel activities are unconscionable from the point of view of any government which is interested in high levels of production and employment. The advocates of competitive private enterprise and of state-managed economy may also be able to agree that there are types of economic control which should not be privately undertaken—and this agreement need not be destroyed by the fact that the former wish such controls to be entirely avoided while the latter wish them to be applied only for public purposes and by public authority.

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The outlines of an international program expressing such a limited agreement might be approximately as follows:

1. A broad statement of the objective to prevent private joint restrictive action of types which are generally condemned.

2. A definition of activities which it is now agreed fall into this category, with provision by which the list can be modified and enlarged or curtailed as experience suggests. For illustrative purposes, it might be possible for governments to agree that no private cartel should be allowed to allocate territories or lines of business activity in international trade, or set limits to production or export, or suppress technology, or fix prices.<sup>19</sup>

3. A reservation of the freedom of each country to pursue its own independent policies toward such aspects of the problem of international monopolistic practices as are not covered by the international agreement. Such a reservation would enable the United States, Canada, Australia, Brazil, Argentina, and other countries which have domestic legislation on the subject to main-

<sup>19</sup> Since this lecture was delivered, the Special Committee on Post-war Economic Policy and Planning of the House of Representatives has published a report in which it recommends an attempt to outlaw private agreements to fix prices, divide markets, establish export quotas, limit production, limit new investment, or otherwise reduce competition in international markets. It also recommends that all private international agreements be registered with an international organization and that there be provisions to prevent the use of patent licenses to do what is forbidden in commercial agreements. See "Post-war Economic Policy and Planning," House Report No. 541, 79th Congress, 1st Sess.

In May, 1945, William L. Clayton, Assistant Secretary of State, testified before a joint session of the Senate Special Committee Investigating Patent Laws and a subcommittee of the Senate Judiciary Committee, to the effect that the Department of State intends to seek the concurrence of other countries in an agreement prohibiting commercial enterprises from participating in contracts and combinations which restrain international trade, restrict access to international markets, or foster monopolistic control in international trade. He indicated that each government would be expected to enforce the agreement within its own sphere of jurisdiction but that an international office for business practices would be proposed as an agency to facilitate cooperation between governments. See Department of State, Release No. 436, May 17, 1945.

tain the effectiveness of their respective antitrust laws and would enable countries which wish to extend a limited tolerance to private restrictive activities to do so.

4. Assumption by each government of the responsibility for investigating violations of the international agreement and taking whatever steps are necessary to enforce it. The means of investigation and of enforcement would necessarily differ from country to country, and this need cause no concern so long as each government fulfills its duty to observe the agreement.

5. Exchange of information among the participating governments in order that the control exercised by each may be more effective. This exchange would necessarily be subject to limits sufficient to protect the strategic and trade interests of national groups.

6. Assumption by each government of an obligation not to act as a shelter for cartel arrangements which take effect in other parts of the world. Under this obligation domestic private restrictions upon trade would be prevented, so far as possible, from becoming a means of evading the international policy. Moreover, it would be an enormous forward step if we could get rid of the kind of international Gresham's law by which lax countries displace careful countries as the centers of incorporation and of the maintenance of international trading agencies.

7. Modifications of international patent and trade-mark conventions to whatever extent may be necessary to make them harmonize with the agreement to prevent objectionable cartel practices.

8. Provision of suitable machinery for international governmental agreements of a restrictive character in those industries, such as the international traffic in munitions, where the public interest may require some form of restriction upon trade. Care



would be needed to prevent this part of an international arrangement from becoming a mere device by which public cartels would be substituted for private ones. The machinery should be so safeguarded that intergovernmental restrictive compacts would be few, would operate with the assent of all the countries concerned, including consuming countries, and would be well exposed to criticism.

This last point merits special attention. Where governmental restrictions run counter to the interests of private business, as in the control of munitions and of habit-forming narcotics, repression of cartels is not likely to be jeopardized by publicly imposed restrictions. Where the restrictions are congenial to private interests, however, it will be difficult to keep them within bounds. In various mineral industries certain forms of limitation of output may be desirable in order to conserve irreplaceable supplies. If such programs are undertaken internationally, we may expect, as in similar domestic programs, efforts to adapt restrictions to monopolistic purposes.<sup>20</sup> We may also expect clamor for "conservation" from other industries in which no scarcity impends.

In a variety of industries which produce raw materials there is a widespread demand for governmental restrictions to alleviate distress arising from surplus stocks and surplus producing capacity. Governmental controls designed to assist in the transfer of resources from these industries to more promising lines

<sup>20</sup> In most cases, although some price increase may be entailed by conservation, the restrictions appropriate to conservation are different in character and scope from those best adapted to increase prices and profits. In petroleum, for example, unit operation of oil pools is the most obvious conservation measure, but it is likely to be less congenial to private interests than a horizontal allocation of production quotas without regard to the number of outlets in a pool or to the boundaries between pools. Similarly, in metal mining a program of conservation is likely to demand that ores be mined systematically whether they are high grade or low grade, while a monopolistic program is likely to restrict total output without requiring such systematic mining.

of endeavor may be justified in the case of agricultural commodities produced by many small undertakings and in certain other cases in which the producers are so isolated, geographically and culturally, that they do not have access to alternative employment. Temporary restrictions designed to alleviate distress during such transfers are likely to be part of the policy of most governments. There may be advantages in making the scope of such programs international. However, there is danger that similar programs will be demanded by industries which face no special difficulties in transferring resources; that agricultural programs will be extended, on pleas of necessity, to include synthetic substitutes for agricultural products; that, with restrictions once obtained, the more arduous and less congenial transfer programs will be neglected; and that ostensibly temporary restrictions will become permanent. Along such lines, so-called exceptions might proliferate until a publicly managed cartel system had been substituted for a private one.

Dangers of this kind center in the mineral industries. Many of these industries are highly cartelized. Unlike agriculture they are not likely to be handicapped in developing programs of restriction by diversity of interest and by technical difficulties. Instead, any public sanction which restriction receives in these tightly controlled fields may be expected to become the excuse for supposedly supplementary private measures more ambitious than governments could sanction. To recognize in the mineral field the legitimate need for conservation and whatever occasional need there may be for public aid in conversion and for public alleviation of temporary distress—this requires the utmost care and discrimination if the attack upon cartels in these industries is not to be rendered meaningless.

Assuming that an international policy directed against cartels is possible, it would be an important part of a post-war return to

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liberal principles of international trade. However, like the anti-trust laws themselves in our domestic economy, it is logically part of a broader program. Measures against cartels and measures against governmental trade barriers must march together if international trade is to be liberated. The adoption and continuance of both programs will be simplified by any measures, national or international, which succeed in maintaining relatively high levels of production and employment throughout the world; for the scramble for a limited market is a principal source of governmental trade barriers and cartels alike. Moreover, in so far as we abandon programs which invoke some form of monopoly to protect the vested interests of trade groups which are threatened with loss of their markets, we increase the strain upon the facilities for shifting business enterprises and their employees into more promising lines of activity. In countries with diverse and relatively self sufficient economies, such shifts can be made largely by private means, and, in so far as government aid is needed, each government can take care of its own problems. In some countries, however, in which there is an unusual dependence upon a few cartelized industries, the problem of readjustment may outrun the technological and financial resources of the community. In so far as this is the case, adoption of a program to repress international cartel restrictions will be substantially aided if there are international programs to assist industrial reconversion and development by loans and by technological information. A prosperous post-war world requires a many-sided policy. No one of the sides can safely be neglected, neither the cartel-policy side nor any other.

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